Supreme Court, U. S.
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80-569
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY,
GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Petitioners are two local unions, one black and the other almost entirely white, although individuals were free to join either local. The unions are and have been of almost equal size. Respondent is a member of the black local who challenged a work distribution practice which allocates jobs equally among the two locals, claiming that it has a discriminatory impact on employment opportunities for blacks in violation of Title VII of the Civil Rights Act of 1964. Class certification was denied because nearly 90% of the members of the black local—the putative class members—petitioned the district court in opposition to the relief plaintiff sought: merger of the two locals. They opposed it because they would thereby lose "our right to equal jobs with whites" and their autonomy to protect the interests of black employees. Both courts below found that over a period of many years neither plaintiff nor any other black employee had suffered any adverse employment consequences from the challenged work distribution practice. The court of appeals, however, found a perceived possibility that if the relative size of the locals changed at some time in the future the practice could have an adverse impact on blacks and thereby violate § 703(c)(2) of Title VII. Solely on that basis, the Court of Appeals directed not that the practice be modified but that the two locals be merged—the very relief 90% of the would-be class had objected to in successfully opposing class certification. Accordingly, the question presented is:

> Is not the order of the Court of Appeals directing merger of the two locals wholly inconsistent with Title VII, the basic principles of equity established by this Court, and the proper allocation of functions between the district courts and the courts of appeals in formulating equitable decrees?

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to the proceeding below:

Ryan Stevedoring Co., Inc.
Rogers Terminal and Shipping Corp.
Louisiana Stevedores, Inc.
Ramsay, Scarlett & Co., Inc.
Baton Rouge Marine Contractors, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local 1830 and Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 14, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 7 FEP Cases 914 (M.D. La. 1974) and is reprinted herein as App. E (28a-40a). The first opinion of the court of appeals is reported at 528 F.2d 551 (5th Cir.

1976) and is reprinted herein as App. C (12a-24a). The order denying rehearing of that decision (Judge Clark dissenting) is reported at 533 F.2d 976 (5th Cir. 1976) and is reprinted herein as App. D (25a-27a). The district court decision upon remand is reported at 443 F.Supp. 899 (M.D. La. 1978) and is reprinted herein as App. B (5a-11a). The second court of appeals decision—the decision from which certiorari is sought—is reported at 613 F.2d 588 (5th Cir. 1980) and is reprinted as App. A (1a-4a).

JURISDICTION

The court below entered judgment on March 14, 1980, App. F (41a-42a). A timely petition for rehearing was denied on May 12, 1980, App. G (43a-44a). On August 5, 1980, Mr. Justice Powell extended the time for filing this petition to and including October 9, 1980, App. H (45a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction over this action under § 706(f)(3), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1343(4).

STATUTORY PROVISIONS INVOLVED

Section 703(c)(2), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-2(c)(2), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> * * * *
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely

> affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 706(g), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-5(g), provides in pertinent part as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

STATEMENT OF THE CASE

Petitioners are Local 1830 and Local 1833 of the General Longshore Workers, International Longshoremen's Association, AFL-CIO. Local 1830 was organized in 1955 and has historically been, and was at the time of this lawsuit, comprised only of black members. Local 1833 was organized in 1956 and has historically been, and

was at the time of this lawsuit, comprised almost entirely of white members.[1] Since their inception, these two locals have bargained jointly—each local being equally represented in the bargaining process—with the Baton Rouge Steamship Association, which is comprised of the stevedoring companies that operate in the Port of Baton Rouge. The result of these joint negotiations is a single collective bargaining agreement covering both locals.

Members of both locals receive their work assignments at a single hiring area. Work assignments are made twice daily at "shape-ups", where foremen select workers for various longshore gangs. Each such gang is comprised of a variety of longshore jobs; all of the jobs pay the identical rate. Selection for a work assignment is not based upon seniority, but must be made in a manner consistent with certain guidelines set out in the bargaining agreement: preference is conferred upon those who were present and registered at the preceding shape-up but who were not then selected for any work assignment; and, overall hiring at each shape-up is to be done in such a fashion as to assure to the extent practicable that the members of each local have equal access to work opportunities. In the latter regard, the collective bargaining agreement provides as follows:

> The employer, while having the right to select his employees, agrees to cooperate with union representatives in effecting an equitable distribution of work among the available work force. A central hiring system will be established wherein work records of

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[1] This case does not concern the reasons for the racial composition of the two locals. There is no evidence, and the courts below did not find, that blacks were excluded from membership in Local 1833, or whites from Local 1830. The only evidence in the record on this point is the statement of nearly 90% of the members of Local 1830 that they understood they were free to join Local 1833 if they so wished. See *infra* at 7.

each employee will be maintained in order to assist the parties in distributing the available work.[2]

At all times since at least since 1965, Local 1830 has had approximately the same number of members as local 1833. App. 34a. The district court found (App. 34a-35a, paragraph numbers omitted):

> There is no dispute about the fact that work has been assigned on close to a 50-50 basis between the two locals, but that over the years, the black longshoremen have been assigned more working hours than have the white members of Local 1833. From the inception of these locals in 1956 through the year 1973, the black members of Local 1830 have been assigned 54 per cent of all of the longshoremen's work at the docks.
>
> During the whole seventeen years from 1956 to 1973, there have been only two years (1971-1972) that blacks have not worked more hours than whites.
>
> After a union member has worked 700 hours or more in a year, he is entitled to vacation pay, holiday pay, and welfare benefits. In every year since 1956 more blacks than whites have been assigned over 700 hours of work per year.

Respondent, Alton J. Bailey, is a black longshoreman and a member of Local 1830. Bailey brought suit in the United States District Court for the Middle District of Louisiana against petitioners (the two locals) and certain of the stevedoring companies which make up the employer associations, alleging, *inter alia*, that the so-called "50%-50% rule" violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[3] As relief, Bailey

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[2] Defendants' Exhibit E-5, Article 1, Section F, page 4.

[3] Bailey's complaint did not actually allege the existence of a "50%-50% *rule*." Rather, it alleged that the defendants "allocate approximately" 50% of the available jobs to the members of each local. The complaint further alleged that Local 1830 has approximately twice as many members as Local 1833, and therefore that

sought, *inter alia*, an order directing the merger of the two locals.

In addition to his individual action, Bailey sought to represent a class of "other persons similarly situated." At the time the lawsuit was initiated Local 1830 had approximately 230 members. A petition of 204 of these members in opposition to certification of a class was presented to the district court. In pertinent part, the petition stated as follows (App. 13a-14a, emphasis added):

> We understand . . . Bailey claim[s] to represent all black persons employed as longshoremen on the Port Allen docks since 1965 and all black persons who are members of Local 1830.
>
> We understand [he is] seeking to join our black Local 1830 and the white Local together.
>
> We state . . . Bailey [does] not represent us as a class in [his] effort to integrate the unions. *If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.*
>
> By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. . . . .

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members of the latter local have "twice as great an opportunity to secure employment." There is no evidence in the record of any hard and fast "50%-50% rule." To the contrary, the collective bargaining agreement, quoted in text, *supra*, calls only for "equitable distribution of work." And the district court did not find there to be such a "50%-50% rule." Rather, the district court found that in practice, the memberships of the two locals having been virtually equal for years (contrary to Bailey's allegation), jobs were allocated on "close to a 50-50 basis." App. 34a.

> *We do not want . . . Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now.*

Based largely on this petition, the district court refused to certify the case as a class action App. 33a, 38a-39a. On the merits, the district court, after a trial, found, *inter alia*, as follows (App. 33a-34a, 35a, paragraph numbers omitted):

> There is not one bit of evidence in this record to support plaintiff's claim that the defendants [i.e. the locals and the stevedoring companies] have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions or privileges of employment, ...
>
> * * * *
>
> There is no credible evidence to support the contention that the defendants have in any way discriminated against blacks in either the volume or the nature of the work assigned to longshoremen at the Port of Baton Rouge.

Finding that Bailey had not suffered from any discrimination at the hands of the defendants, the district court entered judgment in favor of defendants, dismissing Bailey's suit in its entirety.

On appeal, the Fifth Circuit affirmed the district court's refusal to treat the case as a class action, stating that "[i]t appears . . . that the views of a majority of the black longshoremen are antagonistic with those of the appellant, the would-be standard bearer for the proposed class." App. 14a. On the merits, the court of appeals sustained the district court's findings that Bailey had not personally suffered from any racial discrimination by the defendants and that there had been no discrimination "against blacks in either the volume or the nature of work assigned to longshoremen at the Port of

Baton Rouge." App. 18a. The Fifth Circuit stated flatly that Bailey "did not prove that the 50%-50% rule *actually* deprived blacks of employment opportunities." App. 18a, n.8.

Nevertheless, the court of appeals reversed, finding that the "50%-50% practice" violates § 703(c)(2) of Title VII, 42 U.S.C. § 2000e-2(c)(2). The court explained the nature of this violation as follows (App. 23a, emphasis added): "Because of the inevitable fluctuation in union membership, there is a real *possibility* for discriminatory treatment." See also App. 17a, n.6 (emphasis in original): "* * * Although the *reality* of discriminatory treatment was not proven in this case, the *threat or potential* is obvious and is violative of 42 U.S.C. § 2000e-2(c)(2)."

On the basis of this "potential" effect of the "50%-50% rule," the Fifth Circuit directed the very relief that had been opposed by the overwhelming majority of black longshoremen—which opposition had caused denial of class action status: merger of Locals 1830 and 1833.[4] Thus, the court stated (App. 24a):

> We conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%-50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e-2(c)(2), which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities.

Thereafter, petitioners unsuccessfully sought rehearing or rehearing *en banc* in the Fifth Circuit, Judge Clark dissenting from the denial of the latter. App. 25a. This Court denied their petition for a writ of certiorari. 429 U.S. 1052.

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[4] The Fifth Circuit determined that Bailey was not entitled to recover any backpay because he had suffered no injury.

On remand, however, the district court ruled that this Court's intervening decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), compelled it to deviate from the mandate of the court of appeals. The district court stated (App. 11a):

> In the present case, it was determined by both this Court and the Court of Appeals that the plaintiff had suffered no racial discrimination at the hands of any of the defendants, and it was likewise determined by both Courts that no member of the alleged class had been discriminated against by these defendants. Both Courts concluded that the plaintiff was not the representative of a class, and thus, as in the *East Texas Motor Freight* case, he is hardly "in a position to mount a class-wide attack on . . ." the defendants in this case.
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> * * * *
>
> [I]n light of the most recent case law from the Supreme Court, it would be illegal and unjust to compel the merger of the two unions under the circumstances of this case.

Accordingly, the district court again dismissed Bailey's suit, App. 11a. On appeal, the Fifth Circuit reversed, holding that *Rodriguez* required no change in its earlier decision (App. 3a):

> In this Court's prior opinion, it was found that the continuous fluctuation in the membership of each segregated local union and the 50%-50% hiring rule represented a real threat of discriminatory treatment. 528 F.2d at 554 n. 6, 557. Since plaintiff Bailey presently suffers from this threat of discriminatory treatment, he has the requisite standing to assert a violation of his statutory rights under Title VII. Thus, *East Texas Motor Freight System, Inc.* v. *Rodriguez* is inapplicable and plaintiff Bailey was and is entitled to a permanent injunction merging the two segregated local unions into one integrated local union.

REASONS FOR GRANTING THE WRIT

Plaintiff Bailey was denied the status of class representative because nearly 90% of the class he claimed to represent—204 out of approximately 230 black members of Local 1833—opposed the relief he sought, a merger of Locals 1830 and 1833. In explaining their opposition in a "voluntary petition" (App. 13a) filed with the District Court they stated, in part: "If the unions are integrated, we will lose . . . our right to equal jobs with the whites," and they explained that by "maintaining our separate strength, . . . we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port", whereas if the unions were merged, "a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions." (P. 6, *supra*).

Nevertheless, the court below commanded that "our Local Union [be] destroyed" (p. 7, *supra*)—the precise result which they sought to avoid. The court did so not because it determined that the existence of the separate locals was *per se* illegal—an issue which was expressly reserved (App. 24a), and which would raise entirely different substantive and remedial issues than are presented by this Petition.[5] Rather, it did so in order to remedy what it determined to be a violation of § 703 (c) (2) of the 1964 Civil Rights Act in that "the longshoremen were hired according to [a] 50%-50% rule", that is, an allocation of jobs between the locals on a 50/50 basis. According to the court below, "Because of the inevitable fluctuation in union membership, there is a real possibility for discriminatory treatment." (App. 24a;

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[5] It bears emphasis in this connection that the petitioning black members of Local 1833 understood "that if any of us want to we have the right to join the white union or stay a member of the black union now." See 7, *supra*.

see also p. 8, *supra*, quoting App. 23a and 17a, n.6). The Court of Appeals took this drastic step although it approved the finding of the District Court that as a matter of eight years' actual experience the black members of Local 1830 had enjoyed equal employment opportunity (pp. 7-8, *supra*), and although it merely perceived, but had no evidence, that future fluctuation in the relative size of the two locals was "inevitable". And, the Court of Appeals took this step although there were means of relief available which would fully protect against the "threat" the court perceived without requiring the merger that 90% of the affected black employees opposed. See pp. 14-15, *infra*.

In thus overriding the thoughtfully expressed desires of the vast majority of the black members affected (as well as those of the white members of Local 1833, the other petitioner here), the court below may well have unwittingly deefated, rather than promoted, the principal objective of Title VII. How matters will turn out if the decision below stands, only the future can tell. But it can be stated with assurance now that review should be granted because the decision below conflicts with the decisions of this Court in at least two critical respects:

1) The court disregarded the "basic principles of equity" (*Teamsters* v. *United States*, 431 U.S. 324, 374) which, under this Court's precedents, circumscribe the power of a court in fashioning an equitable decree under federal statutes, including Title VII of the 1964 Civil Rights Act.

2) The Court failed to heed what this Court has determined to be the proper "division of functions between the federal trial courts and the federal appellate courts" in the formulation of equitable decrees, although observance of the courts' proper roles "is important in every

case", see *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 410.[6]

1(a). The duty of the courts in formulating equitable relief for violations of federal statutes is well established: As Mr. Justice Harlan wrote in *Mills* v. *Electric Auto-Lite, Inc.*, 396 U.S. 375 at 386:

> In selecting a remedy the lower courts should exercise " 'the sound discretion which guides the determinations of courts of equity,' " keeping in mind the role of equity as "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-330, (1944), quoting from Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).

This fundamental principle has governed the exercise of the Court's equitable powers in remedying violations of

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[6] We disagree with the Court of Appeals' determination that defendants have violated § 703(c)(2). The correctness of that ruling, which is necessary, but by no means sufficient to sustain its judgment, is encompassed within the Question Presented by this Petition. However, because the petitioners' overriding concern is with the preservation of their local unions, and because the Court of Appeals' departure from precedent in formulating the decree so plainly justifies review by this Court, we have not put forward the Court's interpretation of § 703(c)(2) as an independent reason for granting the Writ. This is not to suggest that the Court's interpretation of § 703(c)(2) does not raise an important issue: In that Court's view a practice may "tend to deprive any individual of employment opportunities," despite a lengthy operation of the practice without any adverse employment effects on the plaintiff or any other protected individual, solely on the basis of the Court's unsupported speculation as to what may happen in the future. We are unaware of any other case under § 703(c)(2), or its counterpart § 703(a)(2), which reads this statutory phrase so broadly. Indeed, if the Court of Appeals' reading of that provision in this case were correct, there are few if any forms of classification of employees which would be lawful.

Title VII of the 1964 Civil Rights Act. In *Teamsters* v. *United States*, 431 U.S. 324, 374-375, this Court held:

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practically [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S., at 195-196, modifying 113 F.2d 202 (CA 2); 19 N.L.R.B. 547, 600; *Franks*, [v. *Bowden Transportation Co.*] 424 U.S., [747] at 798-799 (Powell, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.).

These limitations on the exercise of equitable discretion in formulating remedies under Title VII have also been recognized in *Albemarle Paper Co.* v. *Moody*, (hereafter "*Albemarle*"), 422 U.S. 405, 415-16; *Franks* v. *Bowman Transportation Co.*, (hereafter "*Franks*"), 424 U.S. 747, 777-78, text and note at n.39; and *Los Angeles Dept. of Water & Power* v. *Manhart*, (hereafter "*Manhart*"), 435 U.S. 702, 719.

This Court has not only enunciated these precepts; it has implemented them. In *Teamsters*, the Court determined that an "equitable balance * * * should be struck between the statutory rights of victims and the contrac-

tual rights of nonvictim employees." (431 U.S. at 376). And while *Albemarle* emphatically declared that the policies of Title VII ordinarily require that the victims of discrimination who have suffered economic injury be made whole by an award of backpay, it left open the possibility that such relief would be denied in that very case if the defendant could show prejudice by the plaintiffs' initial disclaimer of such relief. (See *id.* at 423-425). In *Manhunt* this Court "[w]ithout qualifying the force of the *Albemarle* presumption in favor of retroactive relief . . . conclude[d] that it was error to grant such relief in this case." (435 U.S. at 723). The Court held that "the presumption" was overcome by the serious adverse impact which such liability would have on pension funds. (See *id.* at 719-723.)

(b) In sharp contrast to this Court's precepts and practice, the Court of Appeals directed a merger of the two locals without regard to the countervailing equitable considerations which were so forcefully called to its attention by the 204 black members' "voluntary petition" (App. 13a). Even as a matter of elementary logic the violation of § 703(c)(2) which the Court of Appeals found could be remedied by an order other than the merger of the locals. That violation was said to consist of "the 50%-50% hiring practice" which created the "*potential*" or "*threat*" of future discrimination. See p. 8, *supra*. Since that practice consisted of the conjunction of separate black and white locals *and* the existence of a 50%-50% "rule" allocating jobs between those locals, that "threat" could be removed, and the violation remedied, by *either* the merger of the locals *or* eliminating the 50%-50% "rule". Yet for aught that appears from its opinion the Court of Appeals did not even consider the latter alternative, which could have been given practical effect in a decree which the District Court should have been directed to formulate on remand once the Court of Appeals had determined that there was a violation. The

Court of Appeals did not find that any relief other than merger would be futile, nor could it have done so; indeed, the collective bargaining agreement between the parties provided for just the contingency contemplated by that court; it contains a clause to allow the employers the flexibility to compensate for any substantial fluctuation in the relative membership of the locals (see pp. 4-5, *supra*).[7]

The Court of Appeals' disregard of this Court's teachings is particularly unjustifiable—and the need for review by this Court all the greater—for two reasons. *First*, unlike the situation in *Albemarle*, *Franks*, *Teamsters* and *Manhart*, the court below had before it no victims of past discrimination whose interest in obtaining full relief was entitled to strong consideration in formulating a remedy. Thus, the element which weighed heavily in favor of broad relief there is entirely absent here.

Second, the Court of Appeals' decision requires these 200-odd innocent employees (as well as the white members of Local 1830) to sacrifice additional valued rights which have statutory and, we submit, even constitutional basis. The decision below directly overrides these employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" vouchsafed by § 7 of the National Labor Relations Act, 29 U.S.C., § 157. As stated in *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33: "That is a fundamental right." It is at the very core of the rights granted by the NLRA and to say the least is not to be overridden in the absence of a clear showing that the objectives of Title VII cannot be effec-

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[7] For example, the hiring formula could have been changed from "50%-50%" to a ratio dependent upon the relative sizes of the two memberships at any given time. Even this assumes that the Court could appropriately direct relief which extended beyond the individual plaintiff Bailey; but see pp. 16-17, n. 9, *infra*.

tuated by some other means. Cf. *California Brewers Assn.* v. *Bryant*, 444 U.S. 598, 609.[8] Particularly instructive in this connection is the *Manhart* decision, where the Court in denying retroactive backpay took heed that in enacting ERISA, "Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." (435 U.S. at 721, n. 40.)

The black members' interest in forming and preserving their own union to further their economic and other interests is, as this Court repeatedly held, also protected by the First Amendment. See *e.g. Thomas* v. *Collins*, 323 U.S. 516; *Trainmen* v. *Virginia*, 377 U.S. 1; *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217; *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463. And while we by no means contend that Congress could not outlaw racially separate locals if necessary to promote equal employment opportunity, that is not this case. And, as *U.S.* v. *Robel*, 389 U.S. 258, 268, teaches, even when legislative concerns regarding national security "are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." Yet the Court of Appeals, though admonished, as a court of equity, to formulate a decree which will provide a "nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims" (see p. 13, *supra*) has in this case chosen to implement § 703(c)(2) by the *most* drastic means.[9]

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[8] As to the black members' right to elect their own officers, hold their own meetings, and to hold office, see also generally the Labor Management Report and Disclosure Act of 1959, 29 U.S.C., § 401 *et seq.* and particularly Title IV thereof.

[9] The Court of Appeals' decree is overbroad in a further, significant respect, in that it unnecessarily goes far beyond protecting the employment opportunities of the individual plaintiff Bailey. While the Court correctly ruled that Bailey as a member of Local

1830 had standing to challenge the "50%-50% hiring practice", the scope of its decree is inconsistent with the spirit if not the letter of *East Texas Motor Freight Co.* v. *Rodriguez*, 431 U.S. 395. For what would be the point of insisting on "careful attention to" the requirements of Rule 23(a) of the F.R. Civ. P. (*id.* at 405) if the courts were free to enter an order which adversely affects the very persons whom the plaintiff is disqualified from representing because they oppose the relief which he seeks? The Fourth Circuit, in *Nance* v. *Union Carbide Corp., Consumer Prods. Div.*, 540 F.2d 718, 722-723 (4 Cir.), recognized that classwide relief, where it is not necessary to remedy the plaintiff's individual claim, is inappropriate in Title VII actions where the requirements of Rule 23 are not met. And the Ninth Circuit has expressly left open the question whether a plaintiff in an action under Title VII might obtain relief benefitting nonparties and broader than that necessary to protect his own individual interests (see *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9 Cir. 1974). But other lower courts have swept away those requirements and imposed unnecessarily broad injunctions with classwide impact despite noncompliance with Rule 23. As the Tenth Circuit rationalized, in *Barela* v. *United Nuclear Corporation*, 462 F.2d 149, 154 (10th Cir.):

> . . . Rule 23 is not the best possible vehicle for the kind of relief which we now consider; its technical prerequisites are therefore often used as a shield whereby its efficacy as a sword is undermined. Many of the cases have suggested that the individual plaintiff seeking an injunction against a pervasive practice assumes the role of a private attorney general attempting to carry out the objectives of an act which is strongly affected by a public interest.
>
> * * * *
>
> A vast number of cases in addition to those cited above . . . emphasize that in the civil rights injunction case the court has the authority, Rule 23 notwithstanding, to fashion an injunctive remedy designed to uproot the policy or practice for the protection of the other employees.

See also, e.g., *Peltier* v. *City of Fargo*, 533 F.2d 374, 379-380 (8th Cir.); *Tipler* v. *E. I. du Pont de Nemours & Co.*, 443 F.2d 125, 130 (6th Cir.), *Taylor* v. *Jones*, —— F.Supp. ——, 23 FEP Cases 1274, 1279-1282 (E.D. Ark.); *William* v. *Boorstin*, 451 F.Supp. 1117, 1126-1127 (D. D.C.), reversed on other grounds, —— F.2d —— (D.C. Cir. Oct. 3, 1980); *Saracini* v. *Missouri Pacific Railroad Co.*, 431 F.Supp. 389, 395-396 (W.D. Ark.).

2. The Courts of Appeals' disregard of fundamental equitable principles established by this Court would alone fully justify review of its decision. But review is appropriate for the additional reason that that court contravened the precedents of this Court by itself directing a merger of the local unions without first remanding the case to enable the District Court to formulate the appropriate remedy for the violation of § 703(c)(2) which the Court of Appeals had found.

As this Court said in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 409: "While we would by no means discount the importance of [the substantive] aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system". See also *id.* at 410. That allocation of functions imposes upon the district courts, rather than the courts of appeals, the initial duty to formulate the appropriate equitable remedy for a violation of law, including violations of Title VII. The statutory "scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." *Albemarle Co.*, *supra*, (422 U.S. at 416), quoted with approval in *Franks*, *supra*, 424 U.S. at 779. And in *Teamsters*, *supra*, where, as we have seen, this Court held that an "equitable balance . . . should be struck between the statutory rights of victims and the contractual rights of nonvictim employees", it was held also that that "determination is best left, in the first instance, to the sound equitable discretion of the trial court." (431 U.S. at 376), following *Franks* and *Albemarle*. See also *Dayton*, *supra*, 433 U.S. at 420.[10]

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[10] As *Albemarle* also made clear, the District Court's exercise of its equitable discretion is subject to appellate review under the

The Court of Appeals was even more needful of the trial court's "keener appreciation of those facts and circumstances peculiar to particular cases" [11] here than in the more familiar situations where the violation consists of proven past discrimination or other deprivation of right which calls for a "make-whole" remedy. In such cases, the record on which a court of appeals bases its determination that there has been a violation may be sufficient to enable it to prescribe the appropriate remedy without further consideration by the district court.[12] But where, as here, there is no such history, and the sole basis for providing injunctive relief is a determination that there is an illegal "threat" of future adverse effects upon black employees, a court is wholly unwarranted in assuming that there is but one way in which that potential can be avoided and the violation remedied.[13]

"familiar" [standard] of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case. (422 U.S. at 424; see also *id.* at 416).

[11] *Albemarle*, 422 U.S. at 421-422, more fully quoted in the succeeding footnote. See also, *e.g.*, *Mayor* v. *Educational Equality League*, 415 U.S. 605, 621, reaffirming "the salutary principle that great weight should be acocrded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances."

[12] As the Court said *Albemarle:* "The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keeper appreciation of those facts and circumstances peculiar to particular cases." (422 U.S. at 421-422). As we have seen, the *Albemarle* case was remanded to the district court for determining whether there was an equitable ground, not offensive to Title VII, for denying backpay.

[13] Here, the complicated hiring process on the Baton Rouge docks, as well as the organizational problems inherent in the merger of two local unions were additional matters bearing on the alterna-

Thus, once the Court of Appeals had determined that there was a violation of § 703(c)(2), a proper regard for its own institutional limitations should have caused that court to remand the case to the District Court for the formulation of a remedy even if the opposition of the black members had not made clear that countervailing equities required careful consideration before a merger of the unions was directed.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY, GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

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tives to merger and the potential disadvantages thereof which would have provided additional guidance as to what relief would be equitable. Cf. *Teamsters, supra*, 431 U.S. at 376, n.62:

> Other factors, such as the number of victims, the number of nonvictim employees affected and the alternative available to them, and the economic circumstances of the industry may also be relevant in the exercise of the District Court's discretion.

No. 80-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF EMPLOYER RESPONDENTS IN SUPPORT OF PETITION

JAMES T. GUGLIELMO
(Counsel of Record)
JAMES C. LOPEZ
LEWIS & LEWIS
Post Office Drawer 393
Opelousas, Louisiana 70570
(318) 948-8201

Attorneys for Respondents, Rogers Terminal & Shipping Corp., Louisiana Stevedores, Inc., Ramsay, Scarlett & Co., Inc., and Baton Rouge Marine Contractors

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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LOCAL 1830 AND LOCAL 1833,
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MEMORANDUM OF EMPLOYER RESPONDENTS IN SUPPORT OF PETITION

STATEMENT OF INTEREST

The parties submitting this brief, Rogers Terminal & Shipping Corp., Louisiana Stevedores, Inc., Ramsay, Scarlett & Co., Inc., and Baton Rouge Marine Contractors, Inc., were defendants in the trial court and appellees in the court below. These companies operate Stevedoring Concerns in the Port of Greater Baton Rouge. For purposes of convenience they will hereinafter be referred to as "the companies" or "the employers". Locals 1830 and 1833 are parties to a deep sea collective-bargaining agreement or contract with the companies. The contract provides the terms and procedures for employment of longshore labor in the Port of Greater Baton Rouge.

Since the order of the Court of Appeals runs in terms only against the unions and deals with their structure, it has not seemed appropriate for us, as employers, to file a separate Petition for Certiorari. We file this memo-

randum, however, because of the potential consequences of the decision below on us as employers, whose concerns the Court of Appeals appears not to have considered.

STATEMENT OF THE CASE

For the purpose of this brief the companies adopt the statement of the case by petitioners.

REASONS FOR GRANTING THE WRIT

The trial court and the Court of Appeals specifically found that there was no employment discrimination shown by the plaintiff. However, the Court of Appeals then ordered a merger of the unions due to its perception that:

> "the 50%-50% hiring practice represents a threat of employment discrimination and thus violates § 2000 e-2 (c) (2) which makes it an unlawful employment practice if it would deprive or tend to deprive an individual of employment opportunities." (App. 24a)

The collective bargaining agreement provides:

> "The employer, while having the right to select his employees, agrees to cooperate with union representatives in effecting an equitable distribution of work among the available work force. A central hiring system will be established wherein work records of each employee will be maintained in order to assist the parties in distributing the available work."[1]

The primary reason for granting this writ is the fact that the decision below conflicts with the rulings of this court in at least two respects. First, the decision disregarded the basic principles of equity required in fashioning a decree under a federal statute—(*E.g. Teamsters* v. *United States*, 431 U.S. 324). Secondly, the decision disregarded the proper and traditional division of functions in the federal judicial system. (*E.g. Dayton Board of Education* v. *Brinkman*, 433 U.S. 406).

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[1] Defendants' Exhibit E-5, Article 1, Section F, Page 4.

1. The equitable considerations of fashioning a proper remedy are very important in this matter to prevent injury to the employees and employers who were found innocent of any discrimination. It is difficult to perceive any equity in the decision of the Court of Appeals. The two unions have functioned in the Port of Greater Baton Rouge since 1956. The operation of the stevedoring functions within the Port have been accomplished in an orderly and efficient manner through the cooperation of the labor unions and the employers. Then Alton Bailey files a lawsuit alleging discrimination, both Courts below find no discrimination, but, due to the *possibility* of discriminatory treatment in the failure, the Court of Appeals orders a merger of the unions. This was done without any testimony as to the effect that such a merger would have on the operation of the port and without any apparent regard for the effect it will have on the 90% of the members of Local 1830 who filed a voluntary petition stating their opposition to Bailey's lawsuit. Such action seems to subject to injury the very persons whom were meant to be protected by Title VII of the Civil Rights Act of 1964. The *Teamsters* case, *supra*, held that an equitable balance must be struck between the rights of victims and the rights of innocent nonvictims.

The stevedoring companies in this case are, on this record, and on the findings below "innocent parties" entitled to the same consideration of their equities in the fashioning of a remedy. Indeed, their equities are entitled to far greater weight than those of the employers who were found guilty of violating Title VII in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, and in *Los Angeles Water & Power Dept.* v. *Manhart*, 435 U.S. 702. Yet, whereas in *Albemarle* this Court directed the trial court to consider even that employer's equities and whereas in *Manhart* this Court itself withheld, on equitable grounds, the retroactive back pay which is presumptively available to the victims of discrimination, the Court of Appeals in this case disregarded the innocent employers' equities entirely. It directed the unions to be merged without

having any evidence (let alone findings) as to the effect that this order would have on the operations of the stevedoring companies.

A merger will require a revamping of the employment system and could well result in many practical problems in job performance by the stevedoring companies. Why should the companies be blindly subjected to such practical problems when there exists only a supposed possibility of discrimination? Would not the proper remedy have been for the Court of Appeals to refer the matter back to the trial court for a proper determination of an equitable remedy? The overwhelming majority of the members of Local 1830, some 90%, have signified that they feel that the present system is equitable. The trial court specifically found that:

> "There is not one bit of evidence in this record to support plaintiff's claim that the defendants have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions or privileges of employment nor is there one bit of evidence as to discriminatory or retaliatory discharges. There is likewise no credible evidence to support a charge that the defendants have refused to hire the plaintiff because of his litigous activities or that they have refused to accord black longshoremen equal employment opportunities." (App. 33a-34a)

The employers have found the system fair and efficient in carrying out the required work. It is submitted that their legitimate interests were not properly considered by the Court of Appeals in fashioning the remedy. Indeed, it is clear from the face of its opinion that in ordering merger the Court of Appeals simply adopted the result it had reached in *Equal Emp. Op. Comm.* v. *International Long. Assn.*, 511 F. 2d 273 (5th Cir. 1975) and *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971). There is no evidence that the factual situation presented by this case is the same as

that presented by the two prior cases—in which there were findings of actual discrimination in hiring, see 511 F. 2d at 280, and 451 F. 2d at 457. Why should these decisions (one from another port, a second from another industry) be treated as decisive of the result in this case absent findings, based on the record, that the situations are in fact the same, and where the hiring pattern has actually been shown to have operated entirely lawfully?

It is paradoxical that the Court of Appeals has failed to consider the potential impact of its order on these employers although *Albemarle* and *Manhart* required that even the equities of guilty employers be taken into account. While petitioners here have understandably emphasized the equities of the affected employees, and particularly the majority of black members of Local 1830 who object to the merger, it is the Court of Appeals' single-minded devotion to the merger result, in disregard of any and all countervailing considerations and potential harm to those affected by its order which, in the final analysis, is the true measure of that Court's striking departure from precedent and principle.

2. The jurisprudence cited by the Petition establishes the principle that the remedy for a violation of a statute must be fashioned to fit the particular case presented and the fashioning of this remedy should be offered first to the trial court. (*E.g.*, *Albemarle Paper Co.* v. *Moody*, *supra*).

If the finding of possible future discrimination is correct, there are several possible remedies other than merger. For example, the collective bargaining agreement provides that the employers and the union shall cooperate to effect an equitable distribution of work among the available work force. A formula could be provided which would allocate available employment among the work force based upon the current membership in the locals or the makeup of the work force. This formula could be revised regularly to reflect any changes. The Court is reminded that there has been no finding that the distri-

bution of the work is not done is an equitable manner, only a finding that there is a *possibility* that it could be distributed in a discriminatory manner in the future. Conversely, there was no showing that the ordered merger would correct the supposed possible problem.

The record and the decision of both the trial court and Court of Appeals recognized that the employers were guilty of no discrimination in this case. The past history of the companies and hiring in the port reflect the non-discriminatory nature of the system. The companies certainly would not condone any violation, real or possible, of Title VII. However, it is respectfully submitted that there are remedies other than merger available to correct any supposed possible problems. Such remedies however, should be formulated by the trial court only after a full hearing on the equities and practicalities of the matter.

CONCLUSION

For the foregoing reasons, as well as the reasons presented by counsel for petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES T. GUGLIELMO
(Counsel of Record)
JAMES C. LOPEZ
LEWIS & LEWIS
Post Office Drawer 393
Opelousas, Louisiana 70570
(318) 948-8201

Attorneys for Respondents,
Rogers Terminal & Shipping Corp.,
Louisiana Stevedores, Inc.,
Ramsay, Scarlett & Co., Inc., and
Baton Rouge Marine Contractors

80-569

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
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v.

ALTON J. BAILEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY,
GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1387

ALTON J. BAILEY,
Plaintiff-Appellant,
v.

RYAN STEVEDORING COMPANY, INC.; ROGERS TERMINAL and SHIPPING CORP.; LOUISIANA STEVEDORES, INC.; RAMSAY, SCARLETT and COMPANY, INC.; BATON ROUGE MARINE CONTRACTORS, INC.; and LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Defendants-Appellees.

March 14, 1980

Appeal from the United States District Court
for the Middle District of Louisiana

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Plaintiff Alton J. Bailey has timely appealed from the December 29, 1977 order of the district court that dismissed his civil rights action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c). This is plaintiff's second appeal to our Court in this matter. This Court's first opinion, *Bailey* v. *Ryan Stevedoring Company*, issued on Bailey's first appeal, appears in 528 F.2d 551 (5th Cir.), rehearing and rehearing en banc denied, 533 F.2d 976 (1976), *cert. denied*, 429 U.S. 1052, 97 S.Ct. 767, 50 L.Ed.2d 769 (1977). That opinion

thoroughly details the facts in this case and they will not be repeated here.

In this Court's prior opinion and mandate, the district court was ordered to grant plaintiff Bailey's motion for a permanent injunction against the continued operation of two racially segregated longshore local unions at the Port of Baton Rouge. 528 F.2d at 557. This Court's mandate was initially issued on June 25, 1976. This Court subsequently recalled its mandate to permit the parties to seek review of the decision in the Supreme Court of the United States. Upon the Supreme Court's denial of certiorari, this Court reissued its mandate on January 19, 1977, and ordered the district court to proceed in accordance with the opinion.

In July, 1977, all the defendants moved the district court pursuant to Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure to set aside this Court's mandate of January 19, 1977 asserting it was contrary to several intervening decisions of the Supreme Court of the United States. Sections 5 and 6 of Rule 60(b) provide that a district court may grant relief from a final order if it would be no longer equitable to give prospective application to the judgment or if any other reason justified relief from the operation of the judgment. The district court entered its order granting the Rule 60(b) motion on December 29, 1977.

In that order, the district court not only dismissed plaintiff's Title VII action, but also refused to enforce this Court's mandate that had been reissued on January 19, 1977. Thus, the district court again denied plaintiff Bailey's request for a permanent injunction merging the two local longshore unions. In a written opinion dated January 27, 1978, the district court explained its dismissal order by stating that the Supreme Court's decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453

(1977), compelled it to deviate from this Court's mandate. We disagree with the district court's order and opinion. The district court's order of dismissal of December 29, 1977 will be reversed and it will be ordered to comply with this Court's mandate that was reissued on January 19, 1977.

East Texas Motor Freight System, Inc. v. *Rodriguez* does not justify the setting aside of our previous mandate. That case and the present case are not factually similar. In *East Texas Motor Freight System, Inc.* v. *Rodriguez*, the plaintiffs lacked the requisite standing to assert that a "no-transfer" employment practice of their employer violated Title VII because they did not possess the necessary qualifications for the positions to which they had requested transfer. Consequently, they could suffer no injury from any alleged discriminatory employment practice.

Plaintiff Bailey, however, as a member of the black local longshore union, suffers from a threat of employment discrimination in violation of 42 U.S.C. § 2000e-2(c)(2) by the operation of the two racially segregated unions in conjunction with the defendants' 50%-50% hiring practice that required each longshore gang to be composed equally of blacks and whites. In this Court's prior opinion, it was found that the continuous fluctuation in the membership of each segregated local union and the 50%-50% hiring rule represented a real threat of discriminatory treatment. 528 F.2d at 554 n. 6, 557. Since plaintiff Bailey presently suffers from this threat of discriminatory treatment, he has the requisite standing to assert a violation of his statutory rights under Title VII. Thus, *East Texas Motor Freight System, Inc.* v. *Rodriguez* is inapplicable and plaintiff Bailey was and is entitled to a permanent injunction merging the two segregated local unions into one integrated local union.

This Court's mandate of January 19, 1977 is also not contrary to the Supreme Court's decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) and *United Air Lines* v. *Evans*, 431 U.S. 533, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Both of those cases concerned the issue whether Title VII was violated by bona fide seniority systems that perpetuated the effects of discriminatory employment practices that actually predated the passage of Title VII or that were legally the equivalent to pre-enactment practices because the charge of employment discrimination had not been filed with the EEOC within the statutory time limits of Title VII, 42 U.S.C. § 2000e-5(e). Even though Title VII extends a measure of immunity to the routine application of bona fide seniority systems, the prospective effect of Title VII does obligate an employer to fill future vacancies on a non-discriminatory basis. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 350-354, 97 S.Ct. at 1862-1864.

Plaintiff Bailey has shown that he suffers from a present threat of discriminatory treatment and loss of employment opportunities from the continuing operation of discriminatory employment practices. This violates 42 U.S.C. § 2000e-2(c)(2), and the record indicates that plaintiff Bailey timely filed the necessary charges of employment discrimination with the EEOC. Thus, we are not concerned with the perpetuation of past effects from discriminatory employment practices that actually or legally predated the enactment of Title VII, and plaintiff Bailey is entitled to injunctive relief.

The order of the district court of December 29, 1977 is reversed and vacated, and on remand, the district court is ordered to proceed in accordance with this Court's mandate of January 19, 1977.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
M. D. LOUISIANA

Civ. A. No. 71-79

ALTON J. BAILEY

v.

RYAN STEVEDORING CO., INC., (2) ROGERS TERMINAL and SHIPPING CORP., (3) LOUISIANA STEVEDORES, INC., (4) RAMSAY, SCARLETT and CO., INC., (5) BATON ROUGE MARINE CONTRACTORS, INC., and (6) LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO.

Jan. 27, 1978

E. GORDON WEST, District Judge:

The plaintiff, Alton J. Bailey, filed this civil rights action against several stevedoring companies and two local longshoremen's unions at the Port of Baton Rouge, Louisiana. On behalf of himself and "others similarly situated," the plaintiff sought injunctive relief, declaratory judgment, and back pay. The plaintiff further sought to have the all black union, Local No. 1830, General Longshore Workers, International Longshoremen's Association, AFL-CIO, merged with the all white union, Local No. 1833.

The District Court found that there was no employment discrimination on the part of any of the defendants, and particularly found that plaintiff had in no way been discriminated against by any of the defendants. This Court further concluded that the claims of the plaintiff were entirely individual in nature and denied the plain-

tiff the class action which he had attempted to bring under Rule 23 of the Federal Rules of Civil Procedure.

On appeal, the Fifth Circuit Court of Appeals affirmed the District Court in part and reversed in part. The Court of Appeals, agreeing with the Trial Court, found the plaintiff did not have a valid individual claim, and that he did not have the requisites to qualify him as a representative for a class action. But then the Appeals Court went on to conclude that while the hiring practice of defendants dividing and allotting jobs on a 50-50 basis between the members of the two unions, which unions each had approximately the same number of members, *did not* result in discriminatory hiring, nevertheless the 50-50 hiring practice represented a *possible future threat* of discrimination should the numerical membership of the two unions change, and then proceeded to remand the case to this Court with a mandate that a permanent injunction issue enjoining the continued operation of the two segregated local unions. In other words, the Court of Appeals agreed that the plaintiff had no meritorious individual claim, and that he could not represent anyone in this suit except himself, but still the mandate required judgment in his favor and against the defendants. Since this Court believes that the law, though it may have been unsettled at that time, has now been clarified by the United States Supreme Court, it feels compelled to deviate from the mandate issued by the Court of Appeals for the following reasons.

Under Rule 60(b) of the Federal Rules of Civil Procedure, the Court may relieve a party of a final judgment when:

> "(5) . . . it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the law."

With this in mind, the following issues are presented to this Court: (1) Does Rule 60(b) give this Court the power to change the judgment of the Appellate Court? (2) Does this Court need leave from the Court of Appeals to entertain the Rule 60(b) motion? (3) If this Court does have such power, do the Supreme Court cases hereinafter referred to warrant deviating from the mandate of the Court of Appeals?

This Court is aware of the trend in the law, as summarized by Professor J. W. Moore in 7 *Moore's Federal Practice* ¶ 60.26(3) at page 325, that generally, Rule 60 (b)(5), "does not authorize relief from a judgment on the ground that the law applied by the Court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." But this Court feels that "this is not an inexorable rule, as indeed the Supreme Court has recognized." *Wright and Miller, Federal Practice and Procedure: Civil § 2864.* In *Polites* v. *U.S.*, 364 U.S. 426, 433, 81 S.Ct. 202, 206, 5 L.Ed.2d 173 (1960), the Court states that:

> "We need not go so far here as to decide when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law."

Following this approach, the First Circuit Court of Appeals in *Theriault* v. *Smith*, 523 F.2d 601 (CA 1-1975), changed a consent decree when a Supreme Court decision "represented a fundamental change in the legal predicates of the consent decree." The Court recognized this as "arguably the kind of situation in which relief should be available under Rule 60(b)(5)." The District Court in *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. — 1969), allowed reopening of a decree upholding the validity of a state tuition grant sys-

tem where the "intervening and supervening edicts of the Supreme Court qualify under the Rule as a 'reason justifying relief from the operation of the judgment' under Rule 60(b)(6)." The Court went on to say, "This is a substantial change in the law and ended further viability of our decision. Now to continue its efficacy would be unjust to those initially and now affected by the order."

Further justification for the use of Rule 60(b) by this Court is evident in the words of the Court in *Radack* v. *Norwegian America Line Agency, Inc.*, 318 F.2d 538 (CA 2-1963), wherein it is stated that Rule 60(b) gives the Court a "grand reservoir of equitable power to do justice in a particular case . . .; the rule should be liberally construed when substantial justice will be served."

Therefore, it is the opinion of this Court that Rule 60(b) should be used in this case. The question now arises as to whether or not the District Court may apply the rule without leave from the Appellate Court.

Many Courts of Appeals have required appellate leave before the District Court may reopen a case which had been reviewed on appeal. However, the Supreme Court just recently ended this anachronism in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). The Government won an antitrust action in the District Court and was affirmed by the Supreme Court. There arose allegations of misconduct on the part of Government counsel and the oil company sought to have the judgment set aside. In holding that leave of the Appellate Court was not necessary for the District Court to act, the Court said:

> "In our view, the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues then before the court,

> and does not purport to deal with possible later events. Hence the district judge is not flouting the mandate by acting on the motion." 97 S.Ct. at page 32.

With such authority, this Court feels no hesitation in applying Rule 60(b) on its own, without leave of court. Thus all that remains is to decide whether or not the Supreme Court case law compels deviation from the terms of the mandate.

The defendants in this case have submitted briefs wherein they urge this Court to consider three recent Supreme Court cases, all decided since the appellate hearing on this case. These cases are *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Air Lines* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); and *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). This Court, however, considers only the latter, *East Texas Motor Freight*, to be dispositive of the issues before it. That suit was brought by Mexican Americans claiming racial and ethnic discrimination due to their initial rejection for line driver jobs under the company's "no-transfer" policy and the subsequent discriminatory effect that this allegedly had on their seniority. Under the "no-transfer" plan, a city driver was forced to resign, and therefore lose seniority, in order to secure the more lucrative line-driver jobs. The plaintiffs in that case did not have the action certified as a class action. On the individual action, the plaintiffs clearly did not shoulder their burden of proof. The District Court dismissed, for the primary reason that a large majority of the union had only recently rejected a merger of the seniority lists of the two groups of drivers, and that the plaintiffs lacked the necessary qualifications for the line-driver jobs. The Court of Appeals also re-

jected the plaintiffs' individual claims, but on its own motion recognized the plaintiffs as representatives in a class action. The Supreme Court reversed the Court of Appeals, stating that Rule 23 requisites had not been complied with. But of even more significance is the fact that the Court did not see fit to consider whether there was discrimination present or not. As in the present case, the courts in both the individual and class actions ruled against the plaintiff. But the Supreme Court then remanded the case on the class action issue. In so doing the Court made it clear that the plaintiffs could not, on their own, without proof of individual or class discrimination, force liability on the defendants. The pertinent language is as follows:

> "The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to the initial hire. In light of that stipulation they are hardly in a position to mount a classwide attack on the no-transfer rule and seniority system . . ." 97 S.Ct. at page 1897.

Factually the present case is very similar. The plaintiff in the case before us was found by both this Court and the Court of Appeals to have no claim either individually or as a class representative, yet liability was imposed upon the defendants. To follow the mandate of the Court of Appeals, and to order a merger of the two unions in this case would impose liability upon the defendants in a situation analogous to that found in *East Texas Motor Freight*, and this, we believe, would be contrary to the

Supreme Court's ruling in that case. In the present case, it was determined by both this Court and the Court of Appeals that the plaintiff had suffered no racial discrimination at the hands of any of the defendants, and it was likewise determined by both Courts that no member of the alleged class had been discriminated against by these defendants. Both Courts concluded that the plaintiff was not the representative of a class, and thus, as in the *East Texas Motor Freight* case, he is hardly "in a position to mount a class-wide attack on . . ." the defendants in this case. Thus, this Court concludes that under the law enunciated in *East Texas Motor Freight*, the defendants simply cannot win, as they did in both Courts here, and still be cast in judgment.

This Court concludes, therefore, that in light of the jurisprudence as it has developed since the issuance of the mandate in this case, it is compelled, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to deviate from the mandate of the Court of Appeals without leave of Court. It further concludes that in light of the most recent case law from the Supreme Court, it would be illegal and unjust to compel the merger of the two unions under the circumstances of this case. Therefore, the mandate of the Court of Appeals in this case is modified and the plaintiff's suit is dismissed. Judgment has been entered herein accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-2544

ALTON J. BAILEY,
Plaintiff-Appellant,

v.

RYAN STEVEDORING COMPANY INC., *et al.*,
Defendants-Appellees.

March 11, 1976

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN and INGRAHAM, Circuit Judges, and O'KELLEY, District Judge.

INGRAHAM, Circuit Judge.

Appellant Alton J. Bailey, a member of Local 1830, filed a civil rights action against five stevedoring companies and two longshore locals charging them with various discriminatory employment practices at the Port of Baton Rouge.[1] In this action in behalf of himself and

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[1] Appellant's action is based on Title VII of the 1964 Civil Rights Act. Section 703(c) provides:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would de-

"other persons similarly situated," appellant sought injunctive relief, declaratory judgment and back pay. The trial court rejected appellant's claims and dismissed his action.

The following issues are presented on appeal: (1) Is appellant entitled to bring a class action in behalf of two hundred and thirty-two members of Local 1830 when two hundred and four members voluntarily state that appellant's claims are unrepresentative of the Local? (2) Is the trial court's finding that appellees were not engaged in discriminatory practices, policies or customs clearly erroneous? (3) Are segregated labor organizations, Locals 1830 and 1833, a violation of the Civil Rights Act?

CLASS ACTION

Instituting this civil rights action under 42 U.S.C. § 2000e-2(c), appellant attempts to advance the interests of himself and "other persons similarly situated." Specifically, the intended class includes "Negro persons who are employed, or might be employed by [the five stevedoring companies named in the petition] . . . or who are members or might be members of LOCALS 1830 and 1833 . . . ." Appellees, however, submitted a voluntary petition to refute appellant's claim of fair representation. 204 of the approximately 230 members of Local 1830 stated in pertinent part:

> "We understand Boudreaux, Wells and Bailey claim to represent all black persons employed as

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prive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c).

longshoremen on the Port Allen docks since 1965 and all black persons who are members of Local 1830.

"We understand they are seeking to join our black Local 1830 and the white Local together.

"We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.

"By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. If our Locals are put together a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions.

"We do not want these three men, Boudreaux, Wells and Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now."

It appears, therefore, that the views of a majority of the black longshoremen are antagonistic with those of the appellant, the would-be standard bearer for the proposed class.

The trial court concluded that "[t]he facts of this case clearly establish that the claims of [appellant] are individual in nature and the issues raised by him are not

issues common to any definable class too numerous to sue individually . . . ." and denied the class action under Rule 23, F.R.Civ.P. The suit was viewed, instead, as an individual action by appellant "for no one's benefit but his own."

In *Phillips* v. *Klassen*, 163 U.S.App.D.C. 360, 502 F.2d 362 at 365-66 (1974), cert. den. 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1975), the court stated:

> "It is axiomatic that in order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit and as contemporary as the requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure that 'the representative parties will fairly and adequately protect the interests of the class.' . . . Where courts discern that the interests of the named plaintiff are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action."

See Wright and Miller, 7 Federal Practice and Procedure § 1768 (1972).

In the instant case we conclude that the trial court did not abuse its discretion in denying the class action. *Cf. Jones* v. *Diamond*, 519 F.2d 1090, 1097-1101 (5th Cir. 1975). The trial court properly proceeded to dispose of appellant's individual claim that he was victimized by isolated acts and general practices of discrimination. *See Air Line Stewards and Stewardesses Ass'n* v. *American Airlines, Inc.*, 490 F.2d 636, 640-42 (7th Cir. 1973), *cert. denied* 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974). We perceive no reversible error pertaining to the district court's ruling on appellant's attempt to make a class action out of a grievance which is clearly individual in nature.

EMPLOYMENT DISCRIMINATION

1. *Local Longshore Practices.* Locals 1830 and 1833,[2] organized in 1955, signed their first contract with the Baton Rouge Steamship Association[3] in 1956.

Longshoremen are hired at Port Allen, Louisiana, at "shape-ups"[4] conducted twice daily (7:00 A.M. and 5:00 P.M.) at a single hiring area. They are hired in racially integrated gangs composed of three to sixteen men, depending on the nature of work to be performed.[5]

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[2] Local 1830, the senior longshoremen's labor organization, is composed exclusively of black members. Local 1833 is composed entirely of whites. The two racially segregated locals service the same geographic area (Port of Baton Rouge) pursuant to a single contract with Baton Rouge Steamship Association, and the locals operate a single hiring area.

[3] The Baton Rouge Steamship Association is an assoication of six stevedoring companies that operate in the Port of Baton Rouge: (1) Baltimore Stevedoring Company; (2) Baton Rouge Marine Contractors; (3) Capitol City Stevedoring Co., Inc.; (4) Louisiana Stevedores, Inc.; (5) Rogers Terminal & Shipping Corp.; and (6) Ryan Stevedoring Co. (ceased local operations in May 1969).

The association, negotiates a single contract with the two locals, both of which are represented during collective bargaining.

[4] A "shape-up" is the hiring procedure at the Port of Baton Rouge. Longshoremen assemble in a single hiring area twice each day, and the foreman selects the necessary number of men to compose his gang.

[5] A contract between the Locals and the stevedoring association governs the size of a longshore gang:

(1) general cargo, not less than 16 men;

(2) utilized cargo for vans, not less than 14 men;

(3) steel products, not less than 14 men;

(4) heavy lifts and package steel, not less than 12 men;

(5) scrap iron, not less than 3 men;

[Footnote continued on page 17a]

As far as practicable, each gang is composed of an equal number of black and white longshoremen [6] and may work under either a black or white pusher/foreman.

The association maintains employment records that indicate whether the union member was present at the shape-up and whether the member was hired. Preference is conferred on union members within the Local that were present but not hired at previous shape-ups. This priority system is unlike seniority systems that characterize other hiring procedures.[7]

The jobs performed by members of each gang can be categorized according to prestige and difficulty: the most

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[5] [Continued]

(6) sacks or bags exceeding 105 pounds, not less than 6 men per side, in addition to a 16 man gang;

(7) loading grain or meal, not less than 10 men;

(8) loading soft-trimming grain ships, not less than 5 men per spout; and

(9) hand trimming, not less than 5 men.

[6] According to the "50%-50% rule," a gang working with general cargo would be composed of 8 members from Local 1830 and 8 members from Local 1833. On its face this system appears quite equitable; however, because of continuous fluctuation in the membership of Locals 1830 and 1833, a real threat of discriminatory treatment exists. *See United States* v. *International Longshoremen's Ass'n*, 334 F.Supp. 976, 978-79 (S.D.Tex. 1971) (Garza, J.) A local with twice the membership would employ proportionally fewer of its members than the smaller local. Although the *reality* of discriminatory treatment was not proven in this case, the *threat* or *potential* is obvious and is violative of 42 U.S.C. § 2000e-2(c)(2).

[7] A seniority system tends to lock in the effect of past discrimination. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 111-15 (5th Cir. 1975). Port of Baton Rouge priority system is fair only to the extent that the 50%-50% hiring practice will allow; whenever membership imbalance occurs, inequitable treatment is inevitable.

prestigious include foreman, pusher and operator; the less strenuous being flagman, checker and waterboy. The same hourly wage is paid for all categories of work.

The district court found no credible evidence to support appellant's contention that appellees discriminated against blacks in either the volume or the nature of work assigned to longshoremen at the Port of Baton Rouge. Since 1955 there have been eighty-four members of Local 1830 assigned to the foreman and pusher positions. Currently there are more blacks than whites assigned to these preferred positions. Furthermore, since 1956 black members of Local 1830 have been assigned 54% of the longshoremen's work at the Port of Baton Rouge, and since the inception of Locals 1830 and 1833 more blacks than whites have been assigned over 700 hours of work per year.[8]

2. *Appellant's Employment History.* Appellant, a member of Local 1830 since 1959, claims that he has been victimized by a systematic exclusion from the most desirable longshore positions and a restriction on the amount of work assigned. As a result he claims severe financial loss.

The trial court, however, found that although it is undisputed that appellant has averaged fewer work hours per year than other longshoremen, the evidence does not support a contention of employment discrimination. An

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[8] 700 hours per year is the standard to determine distribution of benefits. After a union member works 700 hours during a contract year, he is entitled to vacation and holiday pay, as well as welfare benefits. Appellant did not prove that the 50%-50% rule *actually* deprived blacks of employment opportunities. He merely established that the system would *tend to* result in a discriminatory effect. In this situation he is not entitled to recover back pay.

analysis of appellant's employment record supports the trial court's conclusion: [9]

Also relating to appellant's availability for job assignment, president of Local 1830, Mark Young, testified that "Bailey was more or less motivated by politics. If he had something pending in the court, and he felt a decision was going to be made, or he got some communication or felt like an election was about to come around, he came around. But right after the election or after he lost a case, Bailey was out of sight for as much as a month or a year . . . . Bailey showed up less than the average longshoreman." It is apparent that neither the stevedoring companies nor the union locals discriminated against appellant; rather, it is clear that work was assigned when appellant made himself available. Appellant worked fewer hours than the average longshoreman be-

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[9] This chart is based on the testimony of Russell Dibenedetto, an employee of the Baton Rouge Steamship Association, who compiles employment records on each longshoreman.

	Interval			
Employment Status	May 7, 1972-April 29, 1973 [52 weeks]	April 30, 1973-Sept. 30, 1973 [22 weeks]	Oct. 1, 1973-March 31, 1974 [26 weeks]	Total: May 7, 1972-March 31, 1974 [100 weeks]
Hired	138	61	48	247
Available, But Not Hired	19	0	35	54
Refused Assignment	3	1	1	5
Absent From Shape-Up	118	56	52	226

cause he voluntarily elected not to work by absenting himself from the daily shape-ups.

Similarly, the employment decision to exclude appellant from positions of responsibility and special skill (*e. g.*, foreman, pusher and operator) was rationally based. Appellant never applied for admission to the available training programs necessary to qualify for placement in the skilled positions such as crane operator, winch operator and dozer operator. Furthermore, high absenteeism and erratic, antagonistic behavior contributed to the job placement chosen by the stevedoring companies.[10]

CONCLUSION

As noted above, the district court rejected allegations of discriminatory practices, customs and policies. Nevertheless, we conclude that the trial court's conclusion was clearly erroneous, for "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364 at 365, 68 S.Ct. 525 at 527, 92 L.Ed. 746 (1948); *see United States* v. *Singer Mfg. Co.*, 374 U.S. 174 at 194-95, n.9, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963). Section 703(c)(2) of the 1964 Civil Rights Act states: "It shall be an unlawful employment practice for a labor organization . . . to limit, segregate, or classify its membership or applicants for

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[10] The trial court specifically recounts from the evidence an incident in its findings of fact:

> "In 1973 the plaintiff had a dispute over not being retained as a flagman on the day following a four hour shift that he worked as such. Instead of filing a grievance or following established procedures, the plaintiff, as a result of this dispute, proceeded to sit on the cargo, causing an illegal work stoppage without the consent or approval of his union. This resulted in his being arrested and charged with trespassing."

membership . . . *in any way which would deprive or tend to deprive any individual of employment opportunities* . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(c)(2). This court has construed the Act on several occasions and has required a showing of a "discriminatory effect." *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *Equal Employment Opportunity Commission* v. *International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir. 1975); *Local No. 293* v. *Local No. 293-A*, 526 F.2d 316 (5th Cir. 1976) [No. 74-3861, 1976].

In *United States* v. *Jacksonville Terminal Co., supra*, this court ordered amalgamation of racially segregated locals because "[t]he record clearly disclose[d] that the existence of 'separate but equal' locals has had, and may continue to have, post-Act deleterious effects on blacks." 451 F.2d at 457. The specific discriminatory effect noted by the court was the non-existence of black influence in regional and national union affairs:

> "The BMWE [Brotherhood of Maintenance of Way Employees] Seaboard Federation represents all employees in collective bargaining with the Terminal. Terminal delegates to the Federation convention, where union policy presumably is debated and determined, have always come from the all-white local but have cast one vote for each member of both locals. These delegates have been elected exclusively by members of the white local. Thus we must conclude, and the Union has not disproved, that black BMWE members at the Terminal have had no voice in their bargaining agent's councils. Here, at least, black influence in Federation affairs remains nonexistent."

451 F.2d at 457. Racially segregated locals, therefore, were violative of the 1964 Civil Rights Act, Title VII. *Equal Emp. Op. Com'n* v. *International Long. Ass'n*,

supra, cited the *Jacksonville Terminal Co.* opinion and ordered consolidation of two racially segregated locals. As in the instant case, the longshoremen of the segregated locals were hired according to the 50%-50% rule —a practice which has discriminatory potential. Judge Goldberg stated:

> "I conclude that the unions cannot [show that the organizational structure would not *tend* to deprive any *individual* of employment *opportunities* or affect his status as an employee] even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work. There are two reasons for this decision. First, black individuals who might potentially seek employment opportunities as longshoremen would tend to be dissuaded by the onus they would then have to bear of working through an involuntarily all-black organization. Second, there is a significant likelihood that the contracts which would emerge from bargaining sessions in which all of labor's representatives were charged with serving all of the employees would better the employment status of present and potential black employees than does a bargaining committee in which half of the representatives are charged with serving white employees and the other half with serving black employees."

511 F.2d at 277. Judges Thornberry and Godbold specially concurred:

> "[T]he merits of this case can be decided without holding that segregated locals constitute a per se violation of Title VII. As Judge Goldberg notes . . . the lower court here specifically found that 'the Government has discharged . . . [its] burden . . .

> [of showing] that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin.' 334 F.Supp. at 980. . . . We read this language to make merger of segregated locals mandatory *whenever they are shown to have had actual discriminatory effect on employment opportunities.* Since in this case Judge Garza found that employment discrimination resulted from the existence of segregated locals, *Jacksonville Terminal* left him no discretion to refuse merger."

511 F.2d at 280. (emphasis added).

Local 293 v. *Local 293-A, supra,* likewise expressly recognizes the necessity to demonstrate an actual discriminatory effect. 526 F.2d 316 at 319, n. 4.

In this case, as in *Equal Emp. Op. Com'n* v. *International Long. Ass'n, supra,* the longshoremen were hired according to the 50%-50% rule. Because of the inevitable fluctuation in union membership, there is a real possibility for discriminatory treatment. Judge Garza recognized the inherent discriminatory potential of the 50%-50% rule:

> "With the exception of the port of Brownsville, generally the longshoremen's work is divided between the White and Negro locals on a fifty-fifty basis. On its face, this would seem to be a fair shake for the races, but this does not tell the whole story. If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty between the locals, it is obvious that the one hundred Whites will work more hours than the Negroes. The fifty-fifty rule would be ideal if there were an equal number of White longshoremen to Negro longshoremen in every port, but this is not the case. The same

> situation would exist if instead of one hundred White and two hundred Negro longshoremen, there would be two hundred White and one hundred Negro longshoremen in a given port. In that situation, the Black longshoremen would work more hours than the White."

United States v. *International Longshoremen's Ass'n*, 334 F.Supp. 977 at 978-79 (S.D.Tex. 1971).

We conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%-50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e-2(c)(2), which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities. It is unnecessary to reach the issue of whether segregated locals represent a *per se* violation of the 1964 Civil Rights Act.

Reversed and remanded.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-2544

ALTON J. BAILEY,
Plaintiff-Appellant,

v.

RYAN STEVEDORING COMPANY, INC., *et al.*,
Defendants-Appellees.

June 17, 1976

Appeal from the United States District Court
for the Middle District of Louisiana
E. Gordon West, Judge

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Before COLEMAN and INGRAHAM, Circuit Judges, and O'KELLEY, District Judge.

PER CURIAM:

The Petition for Rehearing on behalf of Locals 1830 & 1833—General Longshore Workers, ILA, AFL-CIO is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.

CLARK, Circuit Judge (dissenting):

I respectfully dissent.

Democracy is the linch-pin of labor union representation. Before the law recognizes any organization as the exclusive bargaining agent of American workers, it requires that a majority of those represented select their own steward in an election process conducted under laboratory conditions. I construe the panel opinion to override the vital associational rights involved in this case on the basis of legal deductions that are contrary to the facts and to valid prior precedent in this circuit.

In Bailey's case, 204 out of the total membership of 232 in Local 1830 signed a statement disavowing his putative representative status as a class action plaintiff. In part, these were their words:

> We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.
>
> * * * *
>
> We do not want these three men, Boudreaux, Wells and Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now.

Accepting this overwhelming rejection, this court affirmed the district judge's refusal to allow the action to proceed as a class action.

The panel also found record support for the district court's finding that Bailey's contention of personal employment discrimination was absolutely meritless. The record established that he worked less than other longshoremen solely because he failed to present himself for work under rational, nondiscriminatory employment rules. We likewise affirmed that his failure to qualify for skilled positions was attributable to his high absenteeism and erratic, antagonistic behavior.

Yet without a class and without an individual plaintiff who had suffered any loss from the asserted discriminatory practices or conditions, this court reversed the district judge's refusal to injunctive relief and mandated him to grant Bailey's motion to force the merger of two independent union locals who do not want to merge.

Assuming the court had a plaintiff before it with standing to present a concrete controversy, the prior precedent of this circuit would require the plaintiff to demonstrate *an actual discriminatory effect* before granting such relief. Here the appellate court concludes that, despite the clear proof it finds cogent to deny the class action and individual claim, it must apply a presumption that segregated local union organizations possess "a real *possibility* for discriminatory treatment" and represent "a *threat* of employment discrimination" and that these future contingencies render the trial court's refusal to enjoin an abuse of discretion. With respect, I submit the panel is wrong, bad wrong.

I can take some comfort from the fact that no other judge joins me in this dissent, because it indicates I am in error in concluding that *Bailey* does not slide across the rule that no proof short of actual discrimination will suffice to destroy First Amendment protections abridged here. *Bailey* purports to follow precedent, so next time the question arises at least we can say it did.

APPENDIX E

U.S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 71-79

BAILEY

v.

RYAN STEVEDORING COMPANY, INC., ROGERS TERMINAL AND SHIPPING CORPORATION, LOUISIANA STEVEDORES, INC., RAMSAY SCARLETT AND COMPANY, INC., BATON ROUGE MARINE CONTRACTORS, INC., and LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO.

April 23, 1974

E. GORDON WEST, District Judge:—This suit is another in a long list of suits and charges filed by the plaintiff, Alton J. Bailey, against several stevedoring companies and against two local longshoremen's unions. Plaintiff is a longshoreman who has worked, off and on, for many years at the docks in Baton Rouge, Louisiana. He is a member of Local 1830, General Longshore Workers, International Longshoremen's Association, AFL-CIO. This suit was previously consolidated for trial with a similar suit filed by another longshoreman, one Antoine Boudreaux, which suit was amicably settled prior to trial. The present suit was tried, without jury, on April 8, 1974, and most of the exhibits, interrogatories, answers to interrogatories, pre-trial orders and discovery taken in connection with the Boudreaux suit was made a part of this record either physically or by reference. In the final pre-trial order entered herein on March 15, 1974,

which governs these proceedings, the plaintiff listed his contentions as follows:

"1. The defendants maintain a policy, practice, custom and/or usage of discriminating against plaintiff and other Negro (or Black) persons in the class because of race or color with respect to:

"a) Compensation, terms, conditions and privileges of employment.

"b) By making discriminatory and retaliatory discharges.

"c) By refusing to hire and/or to make lateral transfers and promotions.

"d) By refusing to employ Negro (or Black) persons for certain jobs, e.g., Foreman, Walking Foreman, Checker or Clerk and Crane Operator, etc.

"e) More particularly by refusing to hire the plaintiff, ALTON J. BAILEY, because of his efforts and attempts to obtain equal employment opportunities for the Blacks.

"f) By denying and/or refusing to employ Black persons for certain jobs and from otherwise denying and/or refusing Black persons equal employment opportunities on the ground of their race and color in violation of Title VII of the Civil Rights Act of 1964.

"g) By cooperating with and refusing to restrain the defendants, LOCAL 1830, and LOCAL 1833, GENERAL LONGSHORE WORKERS, I.L.A. AFL-CIO, from maintaining racially segregated labor organizations in violation of Title VII of the Civil Rights Act of 1964.

"2. The defendants have instituted and maintained the following practices, policies, customs and usages

which violate Title VII of the Civil Rights Act of 1964, viz:

"a) Employ persons according to their race and color dividing jobs equally between the defendants, LOCAL 1830, comprised entirely of Negro persons and a membership of approximately 200, and LOCAL 1833, comprised entirely of White persons and a membership of approximately 100.

"b) White persons have twice as great of an opportunity to secure employment with the defendants Stevedoring Companies as do the Black persons.

"c) The defendants reserve the most undesirble jobs for Black persons and have failed and refused to employ Black persons as Walking Foremen, Checkers or Clerks and Crane Operators.

"d) The defendants, LOCAL 1830 and LOCAL 1833, are in violation of Title VII of the Civil Rights Act of 1964 insofar as they are parties to 'Collective Bargaining Agreements' with the defendants Stevedoring Companies which recognize racially segregated labor organizations and job assignments."

These contentions are, of course, all denied by each defendant.

Plaintiff sought to have this suit considered by the Court as a class action. Defendants objected to this procedure. After hearing the evidence in the case, and after carefully considering the entire record in this case, including the many exhibits made a part thereof, the Court concludes that the plaintiff has failed completely to carry the burden of proving his contentions and in support of this conclusion the Court makes the following Findings of Facts and Conclusions of Law.

Findings of Fact

1. The plaintiff, Alton J. Bailey, is a longshoreman who has worked off and on at the Baton Rouge docks for the past fourteen years. He became a member of Local 1830, General Longshore Workers, International Longshoremen's Association, AFL-CIO, (hereinafter "Local 1830") in 1960.

2. Local 1830 was organized in 1955. It was at the time of its organization, comprised of all black members, and its membership is still all black. It, together with Local 1833, has had collective bargaining agreements with the various stevedore companies working the Baton Rouge port since 1956.

3. Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, (hereinafter "Local 1833") was organized in 1956 and has, since that date, been a party with Local 1830 to collective bargaining agreements with the same stevedoring companies referred to above. Local 1833 has always been and still is a union with an entirely white membership.

4. Local 1830 and Local 1833 are each a part of what is called the South Atlantic and Gulf Coast District of the International Longshoremen's Association, AFL-CIO, which District is fully integrated at the District level with the officers and executive board of the District equally divided between black and white members. There are more black locals than white locals in the District, and each local has one vote in District affairs.

5. Ryan Stevedoring Company, Inc., Rogers Terminal and Shipping Corporation, Louisiana Stevedores, Inc., Ramsay, Scarlett and Company, Inc., and Baton Rouge Marine Contractors, Inc. are all stevedore companies who have done or are doing stevedore work at the Baton Rouge docks.

6. The plaintiff, Alton Bailey, joined 1830 in 1960. In 1964 he was a candidate for Secretary of that local,

and was defeated. In 1966 he ran for President of Local 1830 and lost. In 1969 he again ran for President and was elected for a term to begin on February 27, 1969. At the time of this election, both locals were on strike, but a new contract had been negotiated. The plaintiff, upon becoming President, refused to sign the contract on behalf of the union despite the desire of the members to enter into the contract. The membership of the two locals held a "rump" meeting on the street because plaintiff refused to call a meeting. The members of both locals went back to work over plaintiff's opposition. Thereafter the plaintiff signed the contract which the members had approved. As a result of the manner in which Local 1830 was being run, the International Association removed Mr. Bailey from office. This was in May of 1969.

7. Mr. Bailey brought suit in this Court and on June 27, 1969, this Court ordered him reinstated as President.

8. In October of 1969 the International Association with the approval of this Court placed Local 1830 in trusteeship and Mr. Bailey immediately filed suit to have the trusteeship set aside. He took this case all the way to the United States Supreme Court and lost.

9. In 1968 Mr. Bailey filed certain charges with the N.L.R.B. against Local 1830. This dispute was settled and Mr. Bailey was paid the sum of $829.00. Later he filed another suit in this Court in an attempt to recover additional money but was unsuccessful.

10. When the trusteeship ended in 1971, the plaintiff again ran for President and lost. In 1974 he again ran for President and lost.

11. After his loss in 1971, plaintiff filed a protest with the United States Secretary of Labor, who in turn filed suit in this Court to set aside the election, without success.

12. While plaintiff was President of Local 1830 in 1969, he became engaged in a dispute about expenditure of union funds. He apparently presented the Treasurer with two bills for over $3,000.00 each which he wanted paid with union funds. These bills apparently represented bills for attorney fees he had incurred in connection with his personal litigation against the union. The Treasurer would not sign the checks so the plaintiff opened a new union bank account on which he could sign the checks. This dispute also entered into the reasons given for his removal from office as President.

13. Despite all of this litigation and despite all of these charges, Mr. Bailey has continued to be assigned what this Court finds to be his fair share of work at the docks when he has made himself available.

14. Mr. Bailey's problems do not in any way represent the problems of the other members of Local 1830. He is not in any way a representative of other members of this local. There are no common issues of fact or law present such as to make this a class action. The problems complained of by Mr. Bailey are peculiar to him alone.

15. A total of 204 members of Local 1830 out of an approximate membership of 232 members have voluntarily petitioned this Court stating that Mr. Bailey's claims and contentions are not representative of theirs and that they do not wish to be represented by Mr. Bailey. A similar petition was also filed in the Boudreaux case and made a part of this record by reference. Therefore, not only are there no common issues of fact or law, there also is no definable class so large as to require a class action suit.

16. There is not one bit of evidence in this record to support plaintiff's claim that the defendants have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions

or privileges of employment nor is there one bit of evidence as to discriminatory or retaliatory discharges. There is likewise no credible evidence to support a charge that the defendants have refused to hire the plaintiff because of his litigious activities or that they have refused to accord black longshoremen equal employment opportunities.

17. Plaintiff's claim that Local 1830 has twice as many members as Local 1833 and that as a result, when work is divided equally between the two unions the individual members of Local 1830, and particularly the plaintiff, get only half as much work as do the members of Local 1833, is simply not proved. The evidence shows that while prior to 1963, Local 1830 may have had a somewhat larger membership at times than Local 1833, nevertheless, since 1965 the membership of the two locals has been quite comparable. The testimony shows that membership fluctuates almost on a daily basis, but the best evidence available, for example, shows that in 1965 Local 1830 had 168 members and Local 1833 had 147; in 1971 Local 1830 had 214 members and Local 1833 had only 205; in 1973 Local 1830 had 232 members while Local 1833 had 220. These are but examples of random years but the exhibits from which this data comes bears out the conclusion that at least since 1965 the membership in the two locals has been quite comparable.

18. There is no dispute about the fact that work has been assigned on close to a 50-50 basis between the two locals, but that over the years, the black longshoremen have been assigned more working hours than have the white members of Local 1833. From the inception of these locals in 1956 through the year 1973, the black members of Local 1830 have been assigned 54 per cent of all of the longshoremen's work at the docks.

19. During the whole seventeen years from 1956 to 1973, there have been only two years (1971-1972) that blacks have not worked more hours than whites.

20. After a union member has worked 700 hours or more in a year, he is entitled to vacation pay, holiday pay, and welfare benefits. In every year since 1956 more blacks than whites have been assigned over 700 hours of work per year.

21. There is no merit to plaintiff's claim that members of Local 1830 were assigned only the dangerous and less desirable jobs. Defendants' exhibit "C" shows that between 1955 and 1974, 84 members of Local 1830 were, at various times, assigned jobs other than those of a general longshoreman. The "high skill jobs" are crane and winch operators; lift operators; dozer operators; equipment operators; boat operators; welders and mechanics. The easiest jobs are those of flagman, water boy and checker. The most prestigious jobs are those of foreman and pusher. Since 1955 there have been 84 members of Local 1830 assigned to such jobs, and as of now, there are more blacks than whites assigned to these better jobs. During these years, for example, defendant, Baton Rouge Marine Contractors, generally had ten foremen of whom at least four were usually black. The same defendant also shows that since 1967, there have been nine blacks and only three whites who have been given crane operators jobs.

22. There is no credible evidence to support the contention that the defendants have in any way discriminated against blacks in either the volume or the nature of the work assigned to longshoremen at the Port of Baton Rouge.

23. While the evidence supports the contention of the plaintiff, Mr. Bailey, that over the years he has averaged working less hours per year than other longshoremen, it

does not, however, support his contention that this in any way resulted from illegal or improper discrimination.

24. Longshoremen's jobs are not assigned on any basis of seniority. Each foreman selects his men at a morning and evening "shape-up." All members of both locals receive the same rate of pay and the same benefits depending on the number of hours worked, regardless of the particular job to which they are assigned. Thus, there is no question of seniority rights involved in this suit.

25. While the plaintiff has worked less hours, on the average, than other longshoremen, this is not due to any discrimination against him, but rather to the fact that he showed up less for shape-ups than did other workers.

26. As was testified to by Mr. Mark Young, the current President of Local 1830, when Mr. Bailey was involved in politics and law suits, he did not make himself available for work. He would absent himself for weeks and even months at a time. For example, the record shows that in 1965, 1966, and 1967, when the plaintiff was filing charges with the EEOC and running for union office, he apparently worked few, if any, hours. The evidence preponderates in support of the conclusion that during that time he did not make himself available for work. After he lost his bid for office in 1966, he apparently showed up for shape-ups with the result that in 1967-68 he worked 718 hours and in 1968-69 he worked 1,392 hours. His working hours in 1968-69 were 253 hours above the average, and his combined hours for the two years were only 216 hours below the overall average. In 1969-70 the record shows that the plaintiff worked no hours. This was during the period that he was serving as President of the local and during the period that he was spending his time litigating with the union and the stevedore companies. In 1971-72 when he was again running for office he worked only part time, making 850

hours in 1970-71, and 784 hours in 1971-72 as compared with an average of 1,240 hours made by other longshoremen. But after he lost the election, and again made himself available for work, he worked in 1972-73 a total of 1,327 hours compared to an average of 1,430 hours for other workers. The conclusion is inescapable that neither the locals nor the stevedore companies discriminated against the plaintiff nor deprived him of the opportunity to work when he made himself available. He voluntarily elected not to work as much as the other members of the union. Despite his continued antagonistic attitude against his own union and against the companies for which he worked, they continued to offer him his full share of work whenever he made himself available.

27. While the record shows that many black members of Local 1830 applied for and received training for such jobs as crane operator, winch operator, dozer operator, etc., the plaintiff admittedly never applied for training to qualify himself for these jobs, despite the fact that he had the same opportunity to do so as did all the other members of his union.

28. In 1973 the plaintiff had a dispute over not being retained as a flagman on the day following a four hour shift that he had worked as such. Instead of filing a grievance or following established procedures, the plaintiff, as a result of this dispute, proceeded to sit on the cargo, causing an illegal work stoppage without the consent or approval of his union. This resulted in his being arrested and charged with trespassing. Despite this fact, the defendants have continued to offer work to the plaintiff. In 1972-1973 he worked 1,327 hours as compared with an average of 1,430 hours worked by other members of the local.

29. The total evidence in this case gives strong support to the conclusions reached by the witness Mark Young, President of Local 1830, when he said "He (Bailey) has

kept the union in litigation since 1965. His ultimate objective is to flush Local 1830 down the drain."

30. There is simply no credible evidence in this case to support the contention that these defendants, or of any of them, have in any way discriminated against this plaintiff nor in any way deprived him of work in violation of Title VII of the Civil Rights Act of 1964 or in violation of any other federal law.

Conclusions of Law

1. This Court has jurisdiction over this matter pursuant to the provisions of 28 U.S.C. § 1343(4) and 42 U.S.C. § 2000e.

2. The Court finds as a matter of law that the defendants have not, either individually or in concert, maintained a practice, policy, custom or usage of discrimination against this plaintiff or against any other member of either Local 1830 or Local 1833 because of their race, creed or color, and that they have not, as a matter of fact or law engaged in hiring or firing practices, or practices with regard to job assignments, which are in any way violative of the Civil Rights Act of 1964 or of any other federal law.

3. Plaintiff does not present a claim to this Court such as could qualify him to act as a representative of a class as contemplated by Rule 23 of the Federal Rules of Civil Procedure. The facts of this case clearly establish that the claims of this plaintiff are individual in nature and the issues raised by him are not issues common to any definable class too numerous to sue individually if they so desired. As a matter of fact, 204 members of plaintiff's union, out of a total membership of approximately 230, have affirmatively stated, by petition filed of record, that they do not, in any way, share the views of this plaintiff. Thus, as a matter of law, the Court finds

that this is not a class action but instead is an individual suit by this plaintiff, Alton J. Bailey, for no one's benefit but his own.

4. During the trial of this case the Court announced that the issue of discrimination based upon hiring practices and the issue of maintenance of separate locals based upon race would be split. But evidence was permitted to be introduced, as indicated hereinabove, which shows beyond doubt that Local 1830 was chartered as and is in fact a local for blacks only and that Local 1833 was chartered as and is a local for whites only. Since the evidence shows beyond doubt that this maintaining of separate segregated locals has not, in fact, deprived blacks of either hours of work or assignments when qualified to do the "better" jobs, the only question remaining is whether or not the existence of the two segregated locals is per se a violation of the Civil Rights Act of 1964. This Court concludes that there is no per se violation in this case, and that both as a matter of fact and law, under the circumstances of this case, the existence of these two segregated locals does not violate the Civil Rights Act of 1964.

5. This Court adheres to the view stated in United States v. International Longshoremen's Association, 334 F. Supp. 976, 4 FEP Cases 6 (S.D. Tex.—1971) to the effect that it still must be shown that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin. In the cited case, the Court found, as a fact, that such deprivation did exist. In this case, the Court has concluded that such is not the case. Neither blacks nor whites have been discriminated against because of the existence of separate unions. As evidenced by the collective bargaining agreements filed as evidence in this case, it is shown that the agreements are bargained for jointly by Local 1830 and Local 1833

and that both locals are covered by one and the same agreement. To force a merger of these two locals, when the membership of both are opposed to it, and when it is conclusively shown by the evidence that both blacks and whites, and particularly blacks, derive many benefits from the segregation, would do a grave injustice to the very people the Civil Rights Act was designed to help. This case can also be easily distinguished factually from United States v. International Longshoremen's Association, 460 F.2d 497, 4 FEP Cases 719 (CA 4—1972) wherein the Court ordered a merger of two segregated locals. It was clear from the evidence in that case that there was much discrimination in work assignments, and that the blacks were the recipients of the discrimination. In that case the discrimination was found to be a direct result of the segregation. Such is not the case here. In the present case no discrimination has been shown, and in fact, the blacks have received more work regularly than have whites, and they have not been limited to the less desirable jobs. Their segregated union has protected them admirably, as is seen by the petition filed by 204 of the membership of Local 1830 who oppose any idea of a merger. Thus, the Court concludes as a matter of law, that the maintenance of Local 1830 and Local 1833 as separate locals, one for blacks and one for whites, is not, per se, a violation of the Civil Rights Act of 1964, and further, that under the circumstances of this case, the existence of these two locals on a segregated basis does no violence to any of the provisions of the Civil Rights Act of 1964, especially in view of the fact that the plaintiff stands practically alone in his desire to bring about a merger of these locals.

6. The Court concludes, as a matter of law, that the plaintiff is not entitled to any of the relief which he seeks, and therefore a judgment will be entered herein in favor of the defendants, dismissing this suit in its entirety at plaintiff's cost.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 78-1387

D.C. Docket No. CA-71-79

ALTON J. BAILEY,
Plaintiff-Appellant,

versus

RYAN STEVEDORING CO., INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be and the

same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees, pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 14, 1980

Issued as Mandate: May 20, 1980

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1387

ALTON J. BAILEY,
Plaintiff-Appellant,

versus

RYAN STEVEDORING CO., INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 3/14/80, 5 Cir., 197 —, —— F.2d ——)

[Filed May 12, 1980]

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D. Johnson
United States Circuit Judge

Form 704-2

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-127

LOCAL 1830 and LOCAL 1833,
INTERNATIONAL LONGSHOREMEN'S, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 9, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 5th day of August, 1980.

No. 80-569

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO,

Petitioners,

v.

ALTON J. BAILEY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF RESPONDENT, ALTON J. BAILEY, IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

Attorneys for Respondent, Alton J. Bailey:

JONES & JONES

JOHNNIE A. JONES and
ADAIR D. JONES
Attorneys at Law
Taylor Building, Suites 214-216
251 Florida Street
Baton Rouge, Louisiana 70801
Telephone: 504/383-8573

ORTLIEB PRESS BATON ROUGE

STATEMENT OF THE QUESTIONS AND ISSUES PRESENTED

1. The Court of Appeals did not err—but is eminently correct—in maintaining that under F.R.C.P. Rule 60(b)(5) and (6) the District Court was not in anywise compelled to deviate from its decision of March 11, 1976, on which the Mandate was issued July 25, 1976; because that decision reported and cited as 528 F.2d 551 (App. C, 12a-24a), requiring the merger of two (2) racially-segregated unions (Local 1830 [black] and Local 1833 [white], General Longshore Workers, ILA, AFL-CIO), is not *illegal* and *unjust*; and, therefore, that decision of the Court of Appeals remains undisturbed under the subsequent decision of this Court of May 31, 1977, in the case of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891, 14 FEP Cases 1505 (May 31, 1977).

2. Whether the Court of Appeals erred in holding that this Court's decision in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), did not permit the District Court's failure to implement the mandate of the Court of Appeals ordering the desegregation of racially-segregated local unions?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-569

**LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO,**

Petitioners,

v.

ALTON J. BAILEY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF ON BEHALF OF RESPONDENT, ALTON J. BAILEY, IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent, ALTON J. BAILEY, appealed to the United States Court of Appeals, Fifth Circuit, from an order of the United States District Court for the Middle District of Louisiana altering the mandate of the Court of Appeals to desegregate two racially-segregated unions by refusing to order merger and dismissing the suit. The District Court held that it need not comply with the mandate of the Court of

Appeals because of what it deemed to be relevant intervening decisional law.

This is a Title VII employment discrimination action brought over nine years ago by respondent, ALTON J. BAILEY, against five stevedoring companies and two racially-segregated longshoremen's local unions in the Baton Rouge, Louisiana area, Local 1830 (all black) and Local 1833 (all white), International Longshoremen's Association. Mr. Bailey, a black longshoreman member of Local 1830, alleged that the maintenance of the racially-segregated locals and the allocation of longshoremen's work on a 50%-50% basis between the memberships of the two locals, thereby giving the members of the smaller white union proportionately greater opportunities to work, constituted violations of Title VII. He asked that the locals be ordered merged. In addition to these allegations concerning the racially-segregated locals, Mr. Bailey alleged other Title VII violations directed at him individually or against black longshoremen as a group. His complaint sought class certification. 7 FEP Cases 915; 7 EPD ¶ 9424, pp. 8767-68.

After trial in 1974, the District Court held that the racially-segregated character of the locals did not violate Title VII and that, because the size of the unions during the post-Act period was roughly equivalent, the 50%-50% rule did not have a discriminatory effect. The District Court found no substance to Mr. Bailey's other claims and denied class certification because the District Court found there were no common issues of fact and because 204 of the 230 members of the black union notified the court that they did not wish to be represented by Mr. Bailey. 7 FEP Cases 917-19; 7 EPD ¶ 9424, pp. 7869-73.

On appeal, the Court (JJ. Coleman, Ingraham and O'Kelley) affirmed the denial of the class action certification and dismissal of all of Mr. Bailey's claims other than those involving the racially-segregated locals. 528 F.2d 551 (1976).

The Court of Appeals reversed as to the racially-segregated locals. Relying on prior decisions of the Court discussing the harm caused union members by racial segregation, it held the segregated locals unlawful on the grounds that "because of the inevitable fluctuation in union membership, there is a *real possibility* for discriminatory treatment" of Bailey and other blacks. *Id.* at 557. Accordingly, the Court of Appeals said:

> [W]e conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%-50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e-2(c)(2), [1] which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities. It is unnecessary to reach the issue of whether segregated locals represent a *per se* violation of the 1964 Civil Rights Act. *Id.*

The unions petitioned for rehearing, which the Court of Appeals denied, and suggested rehearing *en banc*, which the Court also denied, Judge Clark dissenting. 533 F.2d 976 (1976). The unions then petitioned for *certiorari*, which this Court denied in January, 1977. 429 U.S. 1052.

In March, 1977, Mr. Bailey moved for a pre-trial conference respecting the implementation of the mandate of the Court of Appeals. On July 6, 1977, a week before the pre-trial conference was scheduled, all defendants moved for modification of the mandate pursuant to Rules 60(b)(5) and (6), F.R.Civ.P., asserting that the mandate, judgment or order of

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[1] § 703(c)(2) of Title VII, 42 U.S.C. § 2000e-2(c)(2), reads, in relevant part:

> It shall be an unlawful employment practice for a labor organization . . . to limit, segregate, or classify its membership or applicants for membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . .

the Court of Appeals is contrary to law and recent decisions of the Supreme Court of the United States in that prior cases and theories on whch it is based has been reversed or otherwise vacated and it is no longer equitable that the judgment should have prospetcive application.

The District Court granted the defendants' motion six months later in January of 1978. 16 FEP Cases 710, 16 EPD ¶ 8223. It held that a change in decisional law could be an appropriate basis for the District Court to modify a court of appeals' mandate pursuant to Rule 60(b) and that the District court could do so without leave of the Court of Appeals. 16 FEP Cases at 710-11, 16 EPD ¶ 8223, pp. 5165-66. Of the cases relied on by the unions and employers, the District Court found only *Rodriguez v. East Texas Motor Freight*, 431 U.S. 395 (1977), to be relevant to the issues before it.[2] The District Court wrote:

> . . . That suit [Rodriguez] was brought by Mexican Americans claiming racial and ethnic discrimination due to their initial rejection for line driver jobs under the company's "no-transfer" policy and the subsequent discriminatory effect that this allegedly had on their seniority. Under the "no-transfer" plan, a city driver was forced to resign, and therefore lose seniority, in order to secure the more lucrative line-driver jobs. The plaintiffs in that case did not have the action certified as a class action. On the individual action, the plaintiffs clearly did not shoulder their burden of proof. The District Court dismissed, for the primary reason that a large majority of the union had only recently rejected a merger of the seniority lists of the two groups of drivers, and that the plaintiffs lacked the necessary qualifications for the line-driver jobs. The Court of Appeals also rejected the plaintiffs' individual claims, but on its own motion

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[2] The defendants also relied on the decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); and United Air Lines v. Evans, 431 U.S. 553 (1977).

recognized the plaintiffs as representatives in the class action. The Supreme Court reversed the Court of Appeals, stating that Rule 23 requisites had not been complied with. But of even more significance is the fact that the Court did not see fit to consider whether there was discrimination present or not. As in the present case, the courts in both the individual and class actions ruled against the plaintiff. But the Supreme Court then remanded the case on the class action issue. In so doing, the Court made it clear that the plaintiffs could not, on their own, without proof of individual or class discrimination, force liability on the defendants. The pertinent language is as follows:

> "The district court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus they could have suffered no injury as a result of the alleged discriminatory practices, and they were therefore simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to the initial hire. In light of that stipulation, they are hardly in a position to mount a class-wide attack on the no transfer rule and seniority system . . ." [431 U.S. at 403-04;] 97 S.Ct. at page 1897. Factually the present case is very similar. The plaintiff in the case before us was found by both this court and the Court of Appeals to have no claim either individually or as a class representative, yet liability was imposed upon the defendants. To follow the mandate of the Court of Appeals, and to order a merger of the two unions in this case would impose liability upon the defendants in a situation analogous to that found in *East Texas Motor Freight*, and this, we believe, would be contrary to the Supreme Court's ruling in that case. In the present case, it was determined by both this Court and the Court of Appeals that

> the plaintiff had suffered no racial discrimination at the hands of any of the defendants, and it was likewise determined by both Courts that no member of the alleged class had been discriminated against by these defendants. Both the Courts concluded that the plaintiff was not representative of a class, and thus, as in the *East Texas Motor Freight* case, he is "hardly in a position to mount a class-wide attack on" . . . the defendants in this case. Thus, this Court concludes that under the law enunciated in *East Texas Motor Freight*, the defendants simply cannot win as they did in both Courts here, and still be cast in judgment. [Cf. 443 F.Supp. 899 (M.D. La. 1978), 16 FEP Cases at 711-12; 16 EPD ¶ 8223, pp. 5166-67 (App. B, 5a-11a, at 9a).]

The District Court concluded that, in light of the law established in *Rodriguez*, it would be *illegal* and *unjust* to follow the mandate of the Court of Appeals to compel the merger of the racially-segregated unions. Therefore, this suit was dismissed.

SUMMARY OF ARGUMENT

It is unnecessary in this case for this Court to reach the question of whether, and in what circumstances, an intervening change in decisional law may justify a district court's failure to comply with a court of appeals' mandate. Here there is no colorable argument that the decision on which the District Court relied constituted a change in decisional law as to any relevant legal principle.

The District Court relied on the fact that in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), this Court, having found the action not maintainable as a class action and no merit to the plaintiffs' individual claims, did not go

on to consider the legality of the no-transfer practice at issue. However, the District Court ignored the fundamental differences between the individual claims of the plaintiff-respondent in this case and *Rodriguez*. Here, as a person subject to and personally affected by the racial segregation of the locals and the 50%-50% rule, Mr. Bailey had an individual claim of being the victim of unlawful practices and the Court had to treat the question of the legality of the segregation and 50%-50% rule in order to dispose of that claim. In *Rodriguez*, the individual plaintiffs lacked the threshold qualifications that would make them subject to the rule which they were challenging; hence they could not be affected and were entitled to no relief, irrespective of the rule's legality. Thus, the *Rodriguez* Court's failure to treat the legality of the rule in no way calls into question the propriety of this Court's treating the issue of the legality of the system at issue in this case, nor its holding that the system was unlawful.

ARGUMENT—OR REASONS FOR DENYING THE WRIT

THE DECISION IN *EAST TEXAS MOTOR FREIGHT V. RODRIGUEZ* DOES NOT UNDERMINE, NOR DISTURB IN ANYWISE, THE LEGAL BASIS OF THE DECISION OF THE COURT OF APPEALS IN ANY RESPECT.

Whatever may be the circumstances in which a district court may disobey an appellate mandate because of intervening decisional law[3], there is no question that the intervening decision must at least be relevant—*Rodriguez* is not. Here, there is no colorable argument that the judgment of the Court of Appeals in this action is undermined, or disturbed, by any legal principle articulated or suggested in *Rodriguez*.

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[3] Compare **Lubben v. Selective Service System Local Board No. 27, 453 F.2d 654, 650 (1st Cir. 1972), Mayberry v. Maroney, 558 F.2d 1159, 1162 (3d Cir. 1977), and De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977), with Thierault v. Smith, 519 F.2d 809 (1st Cir. 1975).**

In the prior appeal, the Court of Appeals held that Mr. Bailey, as a member of a racially-segregated union, was immediately subject to being deprived of employment opportunities in violation of § 703(c)(2) because of the inevitable fluctuation in the membership of the locals and the rule that the work be distributed evenly between them. As a member of the black union, Mr. Bailey was a person subject to the system who could challenge it because it affected him. Because Mr. Bailey was himself subject to these practices, the Court of Appeals was compelled to determine the legality of their application to him; having found them to be *unlawful* the Court of Appeals ordered their discontinuance through desegregation of the two locals.[4] The Court of Appeals denied rehearing and this Court denied further review.

Neither Mr. Bailey's ability to challenge the system nor the finding of a Title VII violation by the Court of Appeals or its command to the District Court to desegregate depended on whether the suit could be maintained as a class action. Desegregation would have been appropriate had Mr. Bailey never attempted to bring a class action, as other civil rights decisions make plain. See *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963); *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Brito v. Zia*, 478 F.2d 1200 (10th Cir. 1973).

By contrast, in *Rodriguez*, the plaintiffs were never subject to or personally affected by the unlawful practice which they were challenging because they never met the threshold requirements which would trigger its operation. Thus, unlike here, this Court was not required to examine the legality of the practice in order to dispose.

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[4] A court need not await the occurrence of actual harm to a plaintiff before determining the unlawfulness of a practice or before enjoining it when the threat of harm is impending and inevitable. **Blanchette v. Connecticut General Insurance Co., 419 U.S. 102,144 (1974); Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923).**

In *Rodriguez*, three Mexican-American city drivers brought an action, denominated as a class action, to challenge a trucking company's no-transfer rule (whereby a city driver could not become a road driver without loss of seniority) on the grounds that the rule perpetuated the past discriminatory hiring of minorities into city driver positions only. After trial, for reasons largely related to adequancy of representation, the court dismissed the class action claim, and found that the three plaintiffs could not in any event have been victimized by the no-transfer rule because they were not qualified for road driver positions. See 431 U.S. at 400.

This Court agreed; and held the plaintiffs not to be injured by the challenged no-transfer rule—and, hence, also not class members—because the district court had found them not to be qualified for road driver positions (and because they had stipulated that they had not been discriminated against in initial hire thereby making it clear that they could not be injured by the rule's alleged perpetuation of past hiring discrimination). The Court stated:

> The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to his initial hire. In the light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned. 431 U.S. 403-04; footnotes omitted.

In short, the three plaintiffs could not have been victims of the hiring discrimination which the rule was alleged to

unlawfully perpetuate, nor could they at any time actually be subject to and personally affected by the rule since they could not become road drivers even absent the rule. In no event, therefore, would they be entitled to relief even if the rule were unlawful. The Court of Appeals was able to affirm the district court's denial of individual relief without considering the legality of the rule, as was done in the companion case to *Rodriguez, Herrera v. Yellow Freight System, Inc.*, 560 F.2d 1285 (5th Cir. 1977).

In finding *Rodriguez* relevant, the District Court in the present case ignored the total dissimilarity between the status of the plaintiffs in the two cases. Because the plaintiffs in *Rodriguez* were shown to have no claim against the challenged practice, irrespective of its legality, and were in any event never subject to being personally affected by it, their individual claims could be disposed of without consideration of the legality rule—indeed, a judicial determination of legality would have been an advisory opinion.[5] Here, however, because the plaintiff was the current victim of the practices he was challenging, subject to imminent harm, a judicial inquiry into their lawfulness was unavoidable. See *Blanchette v. Connecticut General Insurance, supra.* 419 U.S. at 144; see generally footnote 4, *supra,* at p. 9. Having properly reached the issue, the Court of Appeals held that the segregated locals and the 50%-50% rule inevitably would "tend to deprive" Mr. Bailey (and all other members of the locals) of employment opportunities, in violation of § 703(c)(2) of Title VII.[6]

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[5] See Preiser v. Newkirk, 422 U.S. 395 (1975); Coppage v. Kansas, 236 U.S. 1 (1915); Elgin National Watch Co. v. Illinois Watch Co., 179 U.S. 665 (1901).

[6] Because Mr. Bailey was subject to both segregation and the 50%-50% rule, the Court of Appeals was able to avoid deciding the question "whether segregated locals represent a per se violation of the 1964 Civil Rights Act." 528 F.2d at 557. Other courts of appeals which have treated the issue have found maintenance of segregated locals to constitute a per se violation. See United States v. International Longshoremen's Association, 460 F.2d 497 (4th Cir.), cert. denied, 409 U.S. 1007 (1972); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974). Moreover, subsequent decisions have found that being subject to a discriminatory work environment itself constitutes signifcant harm. See Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977); Gray v. Greyhound Lines-East, 545 F.2d 169 (D.C. Cir. 1976). A fortiori, exposure to explicit segregation constitutes signifcaint injury.

Rodriguez is totally inapplicable in this case. Nothing in **Rodriguez** calls into question the determination by the Court of Appeals that the legality of the practices was ripe for review or its holdings that the practices violated Title VII and should be enjoined.

In sum, Rodriguez casts no doubt upon any aspect of the earlier judgment by the Court of Appeals in this case. Desegregation of the two locals has already taken over nine years from the filing of the complaint—and three (3) years from the well reasoned opinion of the Court of Appeals. The full Court of Appeals and this Court have had an opportunity to review the prior judgment of the Court of Appeals. Further delays, based on the patently inapplicable grounds advanced by the petitioners and District Court here, simply ought not be tolerated. The District Court should, therefore, immediately be ordered to obey the mandate of the Court of Appeals.

The Court of Appeals has, in essence, via "declaratory judgment," appropriately enjoined the petitioners herein and other defendants in this suit from continuing to enter into collective bargaining agreements, by and between themselves in violation of § 703(c)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e-2(c)(2) and from perpetuating racially segregated locals proscribed under the Constitution and laws of the United States of America.

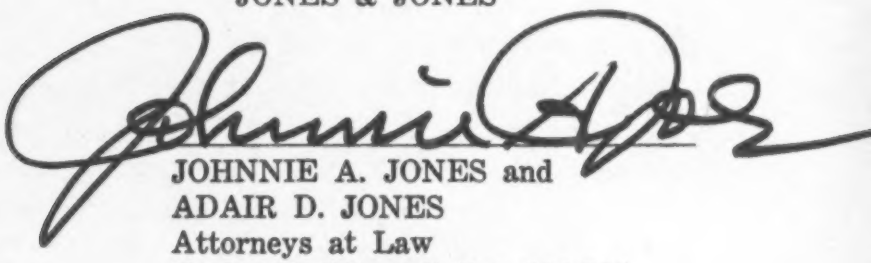
CONCLUSION

For the reasons stated above, the "Petition for a Writ of Certiorari" should be denied.

Respectfully submitted,

Attorneys for Respondent,
Alton J. Bailey:

JONES & JONES



JOHNNIE A. JONES and
ADAIR D. JONES
Attorneys at Law
Taylor Building, Suites 214-216
251 Florida Street
Baton Rouge, Louisiana 70801
Telephone: 504/383-8573

DATED: January 29, 1981

CERTIFICATE OF SERVICE

Undersigned counsel does hereby certify that, pursuant to Rule 28 of the Court, three (3) copies hereof have been mailed with first-class postage prepaid, addressed to each of the following named opposing counsel of record as follows:

1. Mr. George Kaufmann
   Attorney at Law
   2101 "L" Street, N.W.
   Tenth Floor
   Washington, D.C. 20037

2. Mr. C. Paul Barker
   Barker, Boudreaux, Lamy, Gardner & Foley
   Attorneys at Law
   1400 Richards Building
   837 Gravier Street
   New Orleans, Louisiana 70112

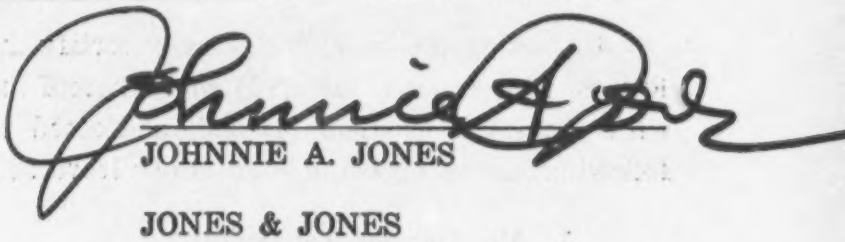
3. Mr. James T. Guglielmo
   Lewis & Lewis
   Attorneys at Law
   Post Office Drawer 393
   Opelousas, Louisiana 70570

4. Mr. Joseph W. Cole, Jr.
   Attorney at Law
   Post Office Box 26
   Port Allen, Louisiana 70767

5. Mr. James A. George
   George & George
   Attorneys at Law
   8110 Summa Avenue
   Baton Rouge, Louisiana 70809

6. Equal Employment Opportunity Commission
   Office of the General Counsel
   Appellate Division
   2401 "E" Street, N.W.
   Washington, D.C. 20506

Baton Rouge, Louisiana, this 29th day of January, 1981.



JOHNNIE A. JONES

JONES & JONES
Attorneys at Law
Taylor Building, Suites 214-216
251 Florida Street
Baton Rouge, Louisiana 70801
Telephone: 504/383-8573

No. 80-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

PETITIONERS' REPLY MEMORANDUM

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY, GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

February 20, 1981

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PETITIONERS' REPLY MEMORANDUM

Respondent Bailey is plainly unable to show that the Court of Appeals' decision to compel the merger of petitioner unions is consistent with Title VII of the Civil Rights Act, the basic principles established by this Court for formulating equitable decrees, or the proper allocation of functions between district courts and courts of appeals in exercising this responsibility. (See Question Presented, Pet. i)[1] Originally, he sought to conceal this inability by filing no Brief in Opposition at all. When

[1] "Pet." refers to Petition for Certiorari herein; "Br. Opp." refers to Respondent's Brief in Opposition. "Respondent" refers to plaintiff Bailey unless otherwise specifically indicated.

that tactic failed, because the Court requested that a response be filed, respondent resorted to a different device: He has submitted a Brief in Opposition which refuses to address the question presented by the Petition; rather, beginning with his own statement of Questions Presented through all that follows, the Brief in Opposition is confined to the correctness of the Court of Appeals' adherence to its original decision notwithstanding this Court's intervening decision in *East Texas Motor Freight Systhem* v. *Rodriguez*, 431 U.S. 395. That issue was decided in the Court of Appeals' second decision in this case but is not sought to be reviewed here.[2] Accordingly, the precedential and practical grounds for review stated in the Petition and in the employer respondents' supporting memorandum remain unanswered; considering that respondent has failed to do so despite two opportunities, they can fairly be regarded an unanswerable. Under the circumstances we would file no reply at all, were it not that three propositions asserted by respondent, almost incidentally, in his otherwise irrelevant discourse, call for brief comment.

I. Respondent refers to the locals throughout as being "segregated". We therefore emphasize that it was not

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[2] As the Court observed in *Mercer* v. *Theriot*, 377 U.S. 152, 153-154:

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation . . . ," *Reece* v. *Georgia*, 350 U.S. 85, 87, for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257. *Cf. Urie* v. *Thompson*, 337 U. S. 163, 171-173; *Messenger* v. *Anderson*, 225 U. S. 436, 444.

See also, *e.g.*, *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365, 366, n. 1.

Nevertheless, and despite the clear statement of the issues presented in the Petition and the grounds for their review, respondent seeks to have this Court treat the Petition as if it raised only the issues decided by the Court of Appeals on the *second* appeal.

found and the record does not show that the respondent or any person, black or white, was excluded from joining or remaining in either of the locals on the basis of race. (Pet., pp. 4, n.2; 7; 10, n.5) only in the special sense that black members, including plaintiffs, have voluntarily chosen to remain members of Local 1833. As acknowledged at Br. Opp. 10, the court below did not decide that segregated locals are *per se* illegal under Title VII.

II. Respondent cites two lower court cases in which it has been held that segregated locals are illegal *per se* (Br. Opp. 10, n.6). We think that those decisions are erroneous because they render superfluous everything in § 703(c)(2) which begins with the phrase "in any way which". (See Pet. 2-3 quoting the entire provision.) In any event, whatever may be the merit of those decisions, they are plainly beside the point, since the Court below expressly eschewed reliance on that theory. Indeed that court "expressly recognizes the necessity to demonstrate an actual discriminatory effect." (Pet. 23a). But the Fifth Circuit has accomplished the same end by a *per se* rule that locals which are separately organized and contain respectively black and white members violate § 703(c)(2) because of a potential "tendency" to cause hiring discrimination, notwithstanding years of experience in which there has been none. The Fifth Circuit reached this result herein by adopting its prior findings of two prior cases in this industry in which findings of actual discrimination had been made, of course on different records. (App. 20a-24a; see Memorandum for Employer Respondent's in Support of Petition, pp. 4-5) And it has done so again in another ILA case in which a petition for certiorari was filed after the present petition and which, in part, raises the same equitable issues presented herein.[3] The Fifth

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[3] *Local 1576, International Longshoremen's Association, AFL-CIO* v. *Equal Opportunity Employment Commission, et al.*, No. 80-1147, filed Jan. 9, 1981. See particularly *id.* at pp. 21-26.

Circuit's course of decision has the effect of reading out of § 703(c)(2) the requirement of a tendency to discrimination not only because the Court apparently makes such a finding automatically despite all prior experience (see Pet. 6), but because it thereupon directs merging the locals without considering (or preferably permitting the District Court to consider) whether some less drastic means is available for eliminating even that tendency. In that connection, the employer respondents' memorandum is worthy of special attention, for given the practical consequences adverted to therein (pp. 3-5) it is plain that the decision below conflicts not only with *Albemarle*, *Manhart* and the other equitable decisions of this Court cited in that memorandum and in the Petition, but also with a decision of the Second Circuit which has clearly understood and correctly applied those equitable principles:

> When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye toward remedying the wrong, *see generally Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421, and should interfere with the defendant's operations no more than is necessary to accomplish this result. (Citations omitted.) This means that it should not proceed to issue a broad sweeping remedial order without some evidence before it as to the effect which the order will have. *Cf. Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394, 401-02 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).[4]

III. In his strenuous but superfluous effort to distinguish the present case from *Rodriguez*, respondent broadly asserts his individual standing to challenge the defendants' allegedly illegal practices. It is therefore necessary to delineate more precisely just what practices

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[4] *E.E.O.C.* v. *Local 14, Intern. Union of Op. Eng.*, 554 F.2d 251, 256 (C.A. 2).

he may challenge, particularly as this bears on the propriety of the relief which he may rightfully obtain. After all, the principal reason for denying him status as class representative was that his views were opposed by the vast majority of the black members whom he claimed to represent and whose rights are adversely affected by the challenged merger order. (Pet. 13a-15; 33a; 39-39a)

It is clear that as a member of one of the affected locals petitioner would have standing to contend that the maintenance of separate black and white locals is illegal. But as already noted, the case was not decided below on this basis; moreover, it appears that in fact respondent would have been free to join Local 1833 at any time and that he would therefore be seeking relief for which he does not need the benefit of a court decree. For both reasons, respondent's conceded standing to contend that separate locals may not lawfully be maintained would have nothing to do with the case even if that position had merit.

Second, respondent plainly had standing to contend that he himself had been discriminated against in hire on the basis of his race. However, that claim was decided against him on the merits by the courts below. (Pet. 18a-20a; 33a-34a)

Third, respondent also contends—and this was the sole theory on which he obtained relief from the Court of Appeals—that the combination of separate locals and what has been referred to as the "50/50 hiring rule" (but see Pet. 5-6, n.3; 34a) has a "tendency" to deprive him of potential hiring opportunities in the future. Under the presently existing precedents of this Court it is a close question whether such a claim of theoretical possible future injury is sufficient to give rise to standing sufficient to satisfy either Article III or the Court's prudential considerations. See, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727; *Warth* v. *Seldin*, 422 U.S. 490; *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 260-264. But

the existing precedents in this Court to clearly require that the lower courts consider the countervailing equities, particularly in cases under Title VII that it has seemed to be inconsistent with the Court's admonitions of specificity and brevity in Petitions for Certiorari to raise separately the closer issue that petitioner lacks standing to obtain (as distinguished from the propriety of the Court of Apepals' granting) the sweeping relief which that Court mandated and of which review is sought herein.[5]

* * * * *

In sum, for foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, and the Memorandum of Employer Respondents in support of the Petition, the Petition should be granted.

Respectfully submitted,

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY,
GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

February 20, 1981

[5] But see Pet. 16-17, n.8, where we observe that denial of class representative status to respondent militates against the granting of relief which impacts adversely on the other black members of Local 1830 whom respondent unsuccessfully sought to represent.